Supreme Court, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

No. 74-754

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

ROBERT B. REICH,
Assistant to the Solicitor General,

PETER M. SHANNON, JR.,
JAMES HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statute involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	20
Cases:	
Blair v. *United States*, 250 U.S. 273	12
Bryson v. *United States*, 396 U.S. 64	18, 19
Commonwealth of Pennsylvania v. *Columbia Investment Corp. et al.*, 325 A. 2d 289	8
Cargill v. *United States*, 381 F. 2d 849, certiorari denied, 389 U.S. 1041	18
Counselman v. *Hitchcock*, 142 U.S. 547	9
Escobedo v. *Illinois*, 378 U.S. 478	14
Glickstein v. *United States*, 222 U.S. 139	18
Harris v. *New York*, 401 U.S. 222	18
Kastigar v. *United States*, 406 U.S. 441	13
Kirby v. *Illinois*, 406 U.S. 682	13
Michigan v. *Tucker*, No. 73–482, decided June 10, 1974	10, 13
Miranda v. *Arizona*, 384 U.S. 436	10, 12
Orozco v. *Texas*, 394 U.S. 324	10
Schneckloth v. *Bustamonte*, 412 U.S. 218	9
Sherman v. *United States*, 356 U.S. 369	20
Sorrells v. *United States*, 287 U.S. 435	20
Stanley v. *United States*, 245 F. 2d 427	8
United States v. *Calandra*, 414 U.S. 338	7, 13, 20
United States v. *Corallo*, 413 F. 2d 1306, certiorari denied, 396 U.S. 958	8
United States v. *Cross*, 170 F. Supp. 303	19
United States v. *DiGiovanni*, 397 F. 2d 409, certiorari denied, 393 U.S. 924	18

565-354—74——1

Cases—Continued

	Page
United States v. *DiMichele*, 375 F. 2d 959, certiorari denied, 389 U.S. 838	8
United States v. *Dionisio*, 410 U.S. 1	10
United States v. *Fruchtmar*, 282 F. Supp. 537	16, 19
United States v. *Knox*, 396 U.S. 177	18
United States v. *Monia*, 317 U.S. 424	9, 13
United States v. *Nickels*, 502 F. 2d 1173	18
United States v. *Parker*, 244 F. 2d 943 certiorari denied 355 U.S. 836	18
United States v. *Pommerening*, 500 F. 2d 92 petition for a writ of certiorari pending, No. 72–229	18
United States v. *Rangel*, 365 F. Supp. 155	5
United States v. *Russell*, 411 U.S. 423	20
United States v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897	8
United States v. *Thayer*, 214 F. Supp. 929	19
United States v. *Washington*, No. 7609, decided November 6, 1974 (D.C. Ct. App)	8
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	18
United States v. *Wong*, C.A. 9 No. 74–1636, decided September 24, 1974, petition for a writ of certiorari pending, No. 74–635	6, 8, 9, 12
United States ex rel. Vajtaver v. *Commissioner* 273 v.s.. 103	13

Constitution and statutes:

United States Constitution:	
Fifth Amendment	2
Sixth Amendment	14
18 U.S.C. 1623	2
Criminal Justice Act, 18 U.S.C. 3006A(a)	13
21 U.S.C. 846	4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, p. 1A–20A) is reported at 496 F. 2d 1050. The opinion of the district court (App. D, *infra*, pp. 25A–42A) is reported at 365 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 21A–22A) was entered on June 28, 1974. A petition for rehearing was denied on October 16, 1974

(App. C, *infra*, pp. 23A–24A). On November 12, 1974, Mr. Justice Powell extended the time to petition for a writ of certiorari to and including December 15, 1974 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness is entitled to be warned, prior to testifying, of his Fifth Amendment privilege.

2. Whether such a "putative defendant" is entitled prior to testifying to complete *Miranda* warnings.

3. Whether every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant."

4. Whether, if a warning of some sort is required, the government's failure to give adequate warning to a "putative defendant" should result in the suppression of his testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

On or before March 29, 1973, a government agent assigned to the Office of Drug Abuse Law Enforcement, received information that respondent was dealing in narcotics (Tr. 24).[1] The agent met respondent on that date, discussed the purchase of one ounce of heroin, and gave respondent $650 (Tr. 24, 26). Respondent thereupon made several telephone calls in order to procure the heroin. When respondent's attempts to procure heroin were unsuccessful, respondent returned the money to the agent (Tr. 26–27).

The agent subsequently informed the government prosecutor, who was seeking witnesses who had possible knowledge of local narcotics traffic to testify before a special drug grand jury then in session, that respondent would be an appropriate grand jury witness (Tr. 29). The prosecutor was informed of the aborted heroin transaction, but he later informed the district court, he did not at that time consider the transaction to have been an indictable offense (Tr. 19).

Respondent was called before the grand jury on May 2, 1973, to determine the identities of his poten-

[1] "Tr." refers to the one volume transcript of the suppression hearing held on August 28, 1973. "8/24 Tr." refers to the one volume transcript of the suppression hearing held on August 24, 1973. "G. Tr." refers to the transcript of respondent's grand jury testimony, a copy of which has been lodged with the Clerk of this Court.

tial sources of heroin (Tr. 20). The prosecutor testified that he did not intend to seek an indictment against respondent at that time (Tr. 15–16). At the outset of respondent's appearance, the following colloquy took place (G. Tr. 3–4):

> Q. * * * Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?
>
> A. Yes, sir.

In order to lay the foundation for broader questions designed to elicit the names of drug traffickers (Tr. 21–22), the prosecutor then asked respondent if during the past year he had talked to anyone about selling heroin, had promised to obtain and sell heroin to anyone, or had accepted money to buy heroin for anyone (G. Tr. 19–20). Respondent denied involvement in any such events or activities.

Respondent was indicted on June 13, 1973, for attempt to distribute heroin, in violation of 21 U.S.C.

846, and for making false declarations before the grand jury, in violation of 18 U.S.C. 1623.

Respondent subsequently moved to suppress his testimony before the grand jury. The district court, after an evidentiary hearing, granted the motion on the ground that respondent was a "putative" or virtual defendant when called before the grand jury and was therefore entitled to full *Miranda* warnings (App. D, *infra*, pp. 37A–38A).[2] Because the warnings he received were not full *Miranda* warnings, the district court suppressed respondent's testimony.[3]

The court of appeals affirmed, adopting the district court's finding that respondent was a "virtual or putative defendant" when called before the grand jury, and agreeing with the district court that such a "putative defendant" is entitled to full *Miranda* warnings

---

[2] Respondent's motion to suppress was considered jointly with a motion raised under similar circumstances and granted by the district court in *United States* v. *Rangel*, affirmed, 496 F. 2d 1059 (C.A. 5). In *Rangel*, however, the warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances raise a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, Rangel's case does not squarely present the issue we are raising, and we are not petitioning in his case.

[3] The government, without the use of respondent's grand jury testimony, proceeded to trial against respondent on the attempt to sell heroin count. Respondent's conviction on the attempt count was affirmed by the court of appeals in an opinion separate from the opinion in the present case. *United States* v. *Mandujano*, 499 F. 2d 370. Respondent's petition for a writ of certiorari is presently pending before this Court, No. 74–5441.

(App. A, *infra,* p. 12A). The court likewise found the warnings given respondent inadequate and reasoned that the prosecutor's conduct, which "smacked of entrapment," was therefore "unfair" (App. A, *infra,* p. 15A). The court concluded that the entire proceedings violated respondent's due process rights under the Fifth Amendment (App. A, *infra,* p. 19A), and therefore agreed with the district court that respondent's perjurious testimony should be suppressed.

REASON FOR GRANTING THE WRIT

This case presents the same two related and important questions concerning procedures for questioning grand jury witnesses and remedies for the government's failure to follow required procedures that we have presented in our pending petition for a writ of certiorari to review the decision of the Ninth Circuit in *United States* v. *Rose Wong,* No. 74-635, and over which the circuits are in conflict: first, whether a grand jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination; and second, assuming that some such advice is constitutionally required, whether the government's failure to give an adequate warning should result in suppression of a "putative defendant's" testimony in a subsequent prosecution for perjury.

This case also poses two additional, related issues with which the court of appeals' opinion in *Rose Wong,* C.A. 9, No. 74-1636, decided September 23, 1974, and our petition in that case, did not directly

deal (in connection with which it also is assumed that some warning is constitutionally required): (1) whether the "putative defendant" concept is to be defined by reference to subjective criteria reflecting the prosecutive intent of government attorneys, or objective criteria that consider whether the government possesses incriminating evidence against the witness at the time he is called to testify; and (2) whether complete *Miranda* warnings are constitutionally required, including a statement of a right to remain completely silent and notice of a right to appointed counsel to be present outside the grand jury room.

In requiring that complete *Miranda* warnings be given prior to the grand jury testimony of a "putative defendant" (defined solely by reference to the fact that the prosecutor has incriminating evidence against him) and suppressing the perjured testimony of a "putative defendant" who had not received such warnings, the court of appeals in the instant case significantly and unjustifiably impeded the investigative power of grand juries, which "must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra,* 414 U.S. 338, 344. It also adopted an unduly expansive notion of the content of the self-incrimination provision of the Fifth Amendment, which does not require the giving of a warning appropriate to police interrogation in the grand jury context and does not in any event permit a witness who receives an inadequate warning to lie to the grand jury with impunity.

1. In holding that the Due Process Clause of the Fifth Amendment requires that a so-called "putative defendant" be given, prior to grand jury questioning, full *Miranda* warnings, the court of appeals in the instant case, as did the Ninth Circuit in *Rose Wong, supra,* carved out an unwarranted exception to the well-established rule that grand jury witnesses need not be given any warnings prior to testifying even when their responses might tend to incriminate them.[4] The court distinguished a "putative defendant"—"someone whom the government had knowledge of having committed a crime, * * * whom the government had planned to indict * * * and against whom it was gathering incriminating evidence" (App. A, *infra,* p. 7A)—from an ordinary grand jury witness, holding that the former is entitled to *Miranda* warnings before testifying.[5] We submit, as we did in our

[4] See, *e.g., United States* v. *Scully,* 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo,* 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *Di Michele,* 375 F. 2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; see also *Commonwealth of Pennsylvania* v. *Columbia Investment Corp., et al.,* 325 A. 2d 289 (Pa. Sup. Ct.).

[5] The Sixth Circuit has suggested that it would subscribe to the same distinction for purposes of requiring warnings. See *United States* v *Luxenberg,* 374 F. 2d 241, 246; *Stanley* v *United States,* 245 F. 2d 427, 434. In no case, however, has the Sixth Circuit intimated that any blanket "right to remain silent" should apply to a "putative defendant" before the grand jury.

The District of Columbia Court of Appeals has recently held that a "putative defendant" must be given *Miranda* warnings before appearing in the grand jury room for questioning and must also be informed that he is considered to be a "putative defendant." *United States* v. *Washington,* D.C. Ct. App. No. 7609, decided November 6, 1974, slip op. 1–4.

petition for a writ of certiorari in *Rose Wong* (a copy of which we are sending to counsel for respondent), that this distinction is warranted by neither precedent nor logic, and that no grand jury witness is entitled, prior to testifying, to any warning of his Fifth Amendment rights, let alone complete *Miranda* warnings.

The Fifth Amendment speaks of compulsion. "It does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him." *United States* v. *Monia,* 317 U.S. 424, 427. Nor does failure to advise of rights make subsequent testimony any less voluntary. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226. Although a witness who testifies before a grand jury may invoke the Fifth Amendment privilege if he has reasonable grounds for believing that truthful responses will tend to be incriminating, *Counselman* v. *Hitchcock,* 142 U.S. 547, "he must claim [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment," *United States* v. *Monia, supra,* 317 U.S. at 427, even if not specifically informed of the right to invoke the privilege.[6]

A respondent's answers before a grand jury are no less *voluntary* because he is suspected of involvement in the criminal enterprise under investigation than are the responses of any other witness. He may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. The greater likelihood that one suspected of having taken part in

[6] See cases cited at n. 4, *supra.*

the offenses that the grand jury is investigating will give responses that may be incriminating does not affect the voluntariness of the responses. Nor is such a grand jury witness more likely to be ignorant of his Fifth Amendment privilege than an ordinary witness who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *'" *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, sup. op. 5.

Nor is the position of a so-called "putative defendant" before a grand jury analogous to the situation of an accused during custodial police interrogation, where explicit warnings are constitutionally required in order to minimize the compulsion inherent in solitary custodial settings difficult to supervise by neutral authority. The critical concern of the Court in *Miranda* was the dangers inherent in "incommunicado" interrogation. *Miranda* v. *Arizona,* 384 U.S. 436, 445. By contrast, no warning is needed in a grand jury setting, where questioning takes place before 23 private citizens under the supervision of a presiding judge and where, if the time scheduled for a witness's appearance is inconvenient, it can generally be altered. See *United States* v. *Dionisio,* 410 U.S. 1; *Miranda* v. *Arizona, supra,* 384 U.S. at 461; *Orozco* v. *Texas,* 394 U.S. 324.

Nor, finally, can it be assumed that the government's primary motive in summoning a potential defendant before a grand jury is, as the court below suggested, to "bait" the witness into incriminating

himself or committing perjury (App. A, *infra,* p. 15A). On the contrary, a witness such as respondent, suspected of having taken part in a substantive offenses of the kind into which the grand jury is inquiring, is likely to represent one of the best sources of information critical to the grand jury's inquiry as to whether a crime has been committed and, if so, the identity of others, who may be involved. In the instant case, for example, since respondent offered to procure heroin from his sources for sale to the federal agent, it was reasonable to conclude that respondent could supply the grand jury with the names of his sources for heroin and thereby help the grand jury determine who was involved in heroin trafficking in the district. Alternatively, such a witness may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury.

In any event, the Fifth Amendment is directed to the prevention of compulsory self-incrimination, not to the suppression of what may be construed as improper prosecutorial motive. Contrary to the conclusion of the court of appeals, we fail to see what is unfair to the witness in governmental efforts to elicit relevant information in the possession of the witness by normal grand jury questioning, provided that there has been no improper compulsion of testimony.

The court of appeals' blanket requirement that every "putative defendant" be given *Miranda* warnings prior to testifying would tend to discourage the

cooperation that is necessary for the grand jury to determine whether criminal proceedings should be instituted against any person. It could place an unwarranted stumbling block in the way of the grand jury's investigation, predicated upon difficult forecasts about who is apt to be indicted. As this Court stated in *Blair* v. *United States,* 250 U.S. 273, 282, "the scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."

2. Even assuming that a so-called "putative defendant" is entitled to some Fifth Amendment warning prior to testifying before a grand jury, the warning respondent received, informing him that "[y]ou don't have to answer questions which would incriminate you," adequately apprised him of his Fifth Amendment rights. Contrary to the assertion of the court of appeals, we find no justification in logic or history for claiming that a putative defendant is constitutionally entitled, in testifying before a grand jury, to invoke a "right to remain silent" or to have appointed counsel available for consultation outside the grand jury room. Such rights and warnings, while perhaps appropriate to mitigate compulsion potentially inherent in police custodial interrogation, were never intended by this Court to "create a Constitutional straightjacket" (*Miranda* v. *Arizona, supra,* 384 U.S. at 467) to be applied across-the-board to every form of official questioning.[7]

[7] The Ninth Circuit in *Rose Wong* required only that the "putative defendant" be apprised of his "right to remain silent."

No witness appearing before a grand jury has a "right to remain silent" *per se.* Rather, he may claim his Fifth Amendment privilege with respect to responses that he has reasonable grounds for believing may tend to incriminate him. See *United States* v. *Monia, supra,* 317 U.S. at 427; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113; *United States* v. *Kordel,* 397 U.S. 1, 10. However, he may be compelled to provide even these responses, under penalty of contempt, if he invokes his privilege and the court grants him immunity coextensive with the privilege. *Kastigar* v. *United States,* 406 U.S. 441. An entitlement to "remain silent" during grand jury questioning, akin to permissible silence during police interrogation, utterly fails to recognize the difference in functions and powers between the police and the grand jury. The court of appeals' equation of the grand jury with the police in this context materially undermines the grand jury's legitimate power of investigation and gives certain witnesses such as respondent, who possess information crucial to the grand jury's determinations, the power effectively to block or impede the grand jury's inquiry. "The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status," *United States* v. *Calandra, supra,* 414 U.S. at 345, yet the public's overriding interest in full disclosure before grand juries may not be overborne except by a valid Fifth Amendment claim (or other recognized testimonial privilege).

In addition to holding that a "putative defendant" must be advised that he may remain silent in the face of grand jury questioning, the court of appeals further ruled that such a witness must be apprised of a right to have counsel appointed if he cannot afford retained counsel. It stated this conclusion without analysis of the source of this right, and the ruling, if allowed to stand, has potentially significant ramifications.

We believe that the government has no duty to inform grand jury witnesses who are not actual defendants of a right to appointed counsel, even if a right to procure appointment of counsel on request exists, which is itself a dubious proposition.[8] While this Court initially embarked on a course that might ultimately have led to recognition of a Sixth Amendment right to counsel for "putative defendants" (see *Escobo* v. *Illinois,* 378 U.S. 478), it quickly abandoned that analysis in *Miranda* itself and has recently held that the Sixth Amendment right to counsel does not attach prior to "[t]he initiation of judicial criminal proceedings." *Kirby* v. *Illinois,* 406 U.S. 682, 689; see also *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op. 4.

Nor, for the reasons already discussed in connection with the supposed "right to remain silent," does the rationale of *Miranda* itself support a requirement to advise grand jury witnesses of a right to counsel.

[8] While not conclusive of the constitutional question, we note that, unless a Sixth Amendment right to counsel has attached, a grand jury witness who is not under arrest and has not been formally charged has no right to appointed counsel under the Criminal Justice Act. See 18 U.S.C. 3006A (a).

Access of an arrestee to the advice of counsel prior to custodial interrogation was considered necessary as an antidote to the special hazards of compulsion, detailed in the *Miranda* opinion, that were found to be ubiquitous in that context. With those fears absent in the grand jury context, gone too is the need for the special medicine prescribed by *Miranda.*

3. The "putative defendant" approach of the court of appeals in this case is, we believe, pregnant with numerous and varied problems for both prosecutors and courts because, among other things, of the difficulties of identifying who is within this category. If the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness, the sanctions for perjury evaporate. Conversely, the ordinary witness given *Miranda* warnings because of the fear that he may later be held by a court to have been a "putative defendant" may be discouraged from providing useful or needed evidence for the grand jury (it is, after all, the premise of the court's decision that the witness who has been warned will be less likely to testify fully and freely).

If there must be such a concept as that of "putative defendant" in the grand jury contest, it should be defined with considerable care. On the facts of the instant case, we submit that—contrary to the finding of the district court, upon which the court of appeals relied—respondent was not a "putative defendant" when he was called before the grand jury. The government attorney who was presenting witnesses to the grand jury testified that respondent's case had not been considered for presentation to the grand jury

565-354—74——3

prior to the time of respondent's testimony, that the files on the case had been closed following the aborted transaction between respondent and the federal agents, and the prosecutor had "no idea [respondent] would be indicted" (Tr. 15). Indeed, the prosecutor stated that he did not consider the transaction between respondent and the federal agent to have been an indictable offense (Tr. 19), and he only learned that it was when later reviewing a possible perjury indictment with another government attorney (8/24 Tr. 56–57).

Nevertheless, despite these assurances, the district court considered the prosecutor's knowledge of the transaction and the "high likelihood that the answers provided by the [respondent] would furnish material for further action on the part of the government" sufficient to "belie the government's protestations of innocent intent with respect to the possibility of future prosecutions" (App. D, *infra*, p. 30A, 31A). In disregarding the prosecutor's denial, the district court relied upon the reasoning of the district court for the Northern District of Ohio in *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio), ~~certiorari denied, 400 U.S. 849~~, in which a similar denial by the government that the witness had been a potential defendant at the time of questioning was deemed irrelevant. (*id.* at 536):

> [I]t does not appear that the examination would have been conducted any differently if [the witness] had [been a potential defendant]. * * * [A] man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.

The test that the district court employed for determining whether respondent was a "putative defendant"—looking to the incriminating evidence available to the prosecutor prior to questioning—would in effect bring every witness against whom the government has some incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no intention of seeking an indictment—because the witness is more valuable as a source of evidence against others, because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him, or because evidence is inadequate to indict. Indeed, the district court's broad test would shield precisely those witnesses whose knowledge of illegal activities is crucial to a grand jury's determination as to whether a crime has been committed and, if so, who is involved.[9]

The proper test for identifying a "putative defendant," we submit, should require that both the objective and the subjective standard be satisfied—that is, there must be sufficient evidence to support an indictment at the time the witness is called, and it must also be established that the witness was in fact a target of the grand jury's investigations whom the prosecutor expected to be indicted. In any event, the question of

[9] While the matter is speculative, it seems likely that neither *Mandujano* nor *Rose Wong* would have been prosecuted at all had they cooperated by testifying truthfully before the grand jury.

establishing a clear definition of the "putative defendant" concept is an important one that should be undertaken by this Court if the concept is to be given controlling importance in the rules governing treatment of grand jury witnesses.

4. In holding that testimony of a "putative defendant" given without prior *Miranda* warnings is inadmissible in a subsequent prosecution for perjury, the court of appeals in the instant case created—as did the Ninth Circuit in *Rose Wong, supra*—an exception to the well-established rule that "the immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States* 222 U.S. 139, 142; see also *Harris* v. *New York*, 401 U.S. 222, 225; *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77. In so doing, the court also brought itself into sharp conflict with decisions of the Second, Seventh, and Tenth Circuits,[10] which have held that even if putative defendants are entitled to some *Miranda* warnings, failure to give the warnings does not license them to commit perjury.

If a witness is improperly compelled to incriminate himself, his incriminating statements may be excluded

[10] *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7) certiorari denied 355 U.S. 836; *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels*, 502 F. 2d 1173 (C.A. 7); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied; 389 U.S. 1041; *United States* v. *Pommerening*, 500 F. 2d 92 (C.A. 10), petition for writ of certiorari pending, No. 74-229.

from use by the prosecution. But he may not avoid the compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States, supra*, 396 U.S. at 72. The court of appeals in the instant case, however, found this broad principle inapplicable to a "putative defendant" who lies to a grand jury, since the government's conduct in bringing such a witness before a grand jury without providing adequate warnings is "unfair" (App. A, *infra*, p. 15A;). The court's finding of "unfairness" was based upon an inference that the government's primary purpose in asking a "putative defendant" incriminating questions was to "entrap" him into committing perjury. As we have already indicated, however, the government has many legitimate purposes for asking a witness, suspected of taking part in the criminal activities, questions to which truthful responses may tend to be incriminating. See. p. 10, *supra*.[11]

Moreover, a "putative defendant" who lies to a grand jury rather than incriminate himself cannot be considered to be "entrapped" into committing per-

[11] The grand jury's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness before a tribunal, or summoning a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed to maximize the opportunity for perjury. See *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo.); *United States* v. *Cross*, 170 F. Supp. 303 (D.D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D.D.C.); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio).

jury, as the concept of entrapment has been articulated by this Court. The government does not implant the design to commit perjury in the mind of such a witness. See *United States* v. *Russell*, 411 U.S. 423, 436. Nor does the government thwart whatever predisposition to tell the truth the witness may have. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369.

Even if such questioning without adequate warning were "unfair," however, it does not follow that the resulting testimony should be inadmissible in a prosecution for perjury. The exclusionary rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Assuming that some prior warning is required, it seems to us unlikely as an empirical matter that prosecutors would risk losing the use of confessions or other incriminating evidence for the sake of obtaining evidence of perjury.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ROBERT B. REICH,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
JAMES HUNOLT,
Attorneys.

DECEMBER 1974.

APPENDIX A

United States Court of Appeals,
for the Fifth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

ROY MANDUJANO, DEFENDANT-APPELLEE

(No. 73-3353)

[June 28, 1974]

Proceeding on motion of defendant to suppress his testimony before special grand jury. The United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge, 365 F.Supp. 155, granted the motion to suppress, and Government appealed. The Court of Appeals, Tuttle, Circuit Judge, held that (1) although as a general rule a grand jury witness is not entitled to warning of his rights to appointed counsel and to remain silent, the full Miranda warnings should have been accorded defendant who, in testifying before the grand jury, was in the position of a virtual or putative defendant, where the Government had focused upon defendant as having committed a crime, where it called him with one eye on prosecution, and where the questioning smacked of entrapping defendant to either incriminate himself or commit perjury, and (2) despite the general rule that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury before the grand jury, all the testimony, incriminating

and perjurious, of a grand jury witness will be suppressed, where the prosecuting officers bring a putative of virtual defendant before the grand jury for the purpose of obtaining incriminating or perjurious testimony.

Judgment *affirmed*.

See also, 5 Cir. 496 F. 2d 1057.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, CJ.

On May 2, 1973, appellee Mandujano appeared as a witness before the DALE (Druge Abuse Law Enforcement) Grand Jury, pursuant to a subpoena. The following warnings were given Mandujano:

> Q: Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A: Do I answer all the questions you ask?
>
> Q: You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A: Yes, sir.
>
> Q: You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury?

Mandujano was further advised that he could have an attorney outside the grand jury room; however, he was not told that he had a right to have appointed counsel outside the grand jury room, that what he

said could be used against him in later proceedings, and that he had a right to remain silent.[1]

A federal narcotics agent had reported that in March, 1973, he offered Mandujano money for the purchase of heroin and gave him $650 for the attempted purchase. The government attorney who questioned Mandujano before the grand jury testified at the motion to suppress that he had discussed with the agent the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. Evidence taken on the motion to suppress also showed that the government attorney requested suggestions for witnesses to be subpoenaed before the grand jury from the agent who had dealt with Mandujano and the agent recommended calling Mandu-

---

[1] Actually Mandujano told the government attorney that he didn't have the money to get a lawyer. The following conversation transpired between them:

"Q: Have you discussed your presence here with anybody?

"A: My wife.

"Q: Have you contacted a lawyer in this matter?

"A: No, sir, I haven't.

"Q: I take that to mean then that you do not wish the services of a lawyer here today?

"A: I don't have one. I don't have the money to get one.

"Q: Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

"A. Yes, sir.

"Q: Is that clear?

"A: (Nod affirmative)."

At no time was Mandujano told that an attorney would be furnished him free of charge if he were financially unable to employ one.

jano and then reported to the attorney how the actual attempt had occurred.

Mandujano was asked the following questions, *inter alia*, by the government attorney before the grand jury:

> Q: Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?
>
> A: No, sir.
>
> Q: Are you sure of that?
>
> A: Yes, sir.
>
> Q: In other words, no one has ever come up to you and wanted to buy heroin?
>
> A: No, sir.
>
> Q: And you have never told anybody that you would try to get heroin to sell to them?
>
> A: No, sir.
>
> Q: Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year?
>
> A: I don't understand you, sir.
>
> Q: Have you talked to anybody about selling heroin to them during the last year?
>
> A: No, sir.
>
> Q: Are you sure about that?
>
> A: I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.
>
> Q: Has anyone ever asked you if they could buy an ounce of heroin or more from you?
>
> A: No, sir.
>
> Q: Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?
>
> A: No, sir.
>
> Q: No one has ever given you any money—
>
> A: No.
>
> Q: —to go buy them heroin?
>
> A: No, sir.

> Q: In other words, if you had $650 right now—
>
> A: Yes, sir.
>
> Q: —Do you think you would be able to purchase an ounce of heroin? . . ."

This interrogation tracked the exact facts of the actual contact between the federal narcotics agent and Mandujano.

The appellee was subsequently indicted in count 1 under 21 U.S.C.A. § 846 for attempt to distribute one ounce of heroin on or about the 29th of March, 1973, and in count 2 under 18 U.S.C.A. § 1623 for making false representations. The perjury count was based on Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The district court granted appellee's motion to suppress his testimony before the grand jury, finding that appellee was a virtual or putative defendant in custody under the *Miranda*[2] decision, and therefore should have been given all *Miranda* warnings. United States v. Mandujano, 365 F.Supp. 155 (W.D.Tex. 1973). The district court determined that the warnings given were inadequate and that appellee could not be deemed to have voluntarily waived his Fifth Amendment right to remain silent. Appellee was convicted under count 1 for attempt to distribute heroin, *without* use of his grand jury testimony.

I. "Putative or Virtual" Defendant

Given the nature of the investigation and the questions tendered by the government attorney, the district court held, and this Court agrees, that full

---

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1965).

Miranda warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant. The district court aptly portrayed the circumstances warranting the fact finding that Mandujano was a virtual or putative defendant during his appearance before the grand jury:

> "The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants. The government had in fact already attempted to make a case against each defendant. Note too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer . . . Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment.

> Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offered to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See United States v. Leighton, 265 F.Supp. 27 (S.D.N.Y. 1967), cert. denied, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968); United States v. Montos, 421 F.2d 215 (5th Cir.), cert. denied, 397 U.S. 1022, 90 S.Ct. 1262, 25 L.Ed.2d 532 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them." United States v. Mandujano, 365 F.Supp. at 158–159 (W.D.Tex.1973).[3]

We construe the foregoing statements by the trial court to be findings that the government had focused upon Mandujano as someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence. Also the discussion indicates that the trial court found that when Mandu-

---

[3] The reference to "defendants" is made in the plural because the district court issued a joint opinion for this case and United States v. Rangel, 365 F. Supp. 155 (W.D. Tex. 1973), because it found that the two cases, though not consolidated and not involving the same transaction, embodied a virtually identical set of circumstances.

jano was brought into the grand jury room, the government then knew that an affirmative answer to questions put to him would amount to a confession of guilt of trafficking in heroin.

Although this Court has recently pretermitted the question of the scope of *Miranda* in the context of a putative defendant before a grand jury investigation, United States v. Morado, 454 F.2d 167 (5th Cir. 1972) and Mattox v. Carson, 424 F.2d 202 (5th Cir. 1970), cert. denied, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed.2d 51 (1971), we have recognized that as a general rule a grand jury witness is not entitled to warnings of his right to appointed counsel and his right to remain silent.[4] The Court of Appeals for the Sixth Circuit, however, has carved out the exception that when a person ceases to be merely a witness in a general investigation and becomes placed "virtually in the position of a defendant," then the full panoply of rights under *Miranda* due a person in custody must be afforded. See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio 1968), cert. denied, 400 U.S. 849, 91 S.Ct. 39, 27 L.Ed.2d 86 (1970); Stanley v. United States, 245 F.2d 427 (6th Cir. 1957).[5]

[4] *Morado, supra* at 173. Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3rd Cir. 1967); United States v. Winter, 348 F.2d 204 (2d Cir. 1965); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

[5] In United States v. Fruchtman, *supra*, in circumstances similar to the instant case, the court found the witness to be a virtual defendant. There the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning; yet, the court noted that this attorney had also read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are similar to those here, where the special government attorney read the narcotics agent's report prior to the grand jury session.

In United States v. Morado, *supra* at 173, we have already recognized the force of the argument that if an investigation has passed beyond the stage of a general inquiry and has focused upon the defendant, then the defendant would be in the position of a virtual defendant:

> Without intimating whether this circuit will agree with this 'virtual defendant' perspective, we note that its emphasis is upon the same factor we have considered to be of prime importance in determining whether or not a man is 'in custody' as that term is used in *Miranda*: 'has the focus of the investigation centered upon him?' United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); United States v. Akin, 435 F.2d 1011 (5th Cir. 1970); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968). If the investigation in the case at bar had passed beyond the stage of being a general inquiry into an unsolved crime of a suspected conspiracy, and had focused upon Solis as a defendant whom the government planned to indict and against whom it was gathering incriminating evidence, we would face the necessity of embracing or rejecting this rule.

The language in *Morado* is particularly applicable in the case at bar because this investigation clearly had passed beyond the stage of general inquiry into an unsolved crime, and had focused upon the defendant as someone whom the government had planned to

indict as it had one eye on prosecution, against whom it was gathering incriminating evidence, and against whom indictments were actually returned.[6] The fact that the questioning attorney immediately pounced upon Mandujano's denial that he had been contacted about the sale of heroin, indicated a clear and direct focus upon Mandujano as a future defendant. Moreover, the government attorney even mentioned the precise figure—$650—which had purportedly been given to Mandujano by the federal narcotics agent, plainly demonstrating that the previous transaction was clearly in the attorney's mind.

Also there was no basis for the perjury count of the indictment until after Mandujano's grand jury appearance. When the government attorney, aware of the alleged prior transaction, asked Mandujano about any previous heroin solicitation or sale, he knew that any truthful answer by Mandujano would be incriminating and therefore protected by the Fifth Amend-

[6] This Court in Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972), discussed at length the application of *Miranda*, stating: "Before law enforcement officers can subject a citizen to custodial interrogation, he must first have been given the *Miranda* warnings. In *Miranda* 'custodial interrogation' was defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'[4] This court has yet to formulate a general rule for distinguishing custodial from non-custodial interrogation but instead has preferred to take a case-by-case approach.[5] . . . In making the distinction between custodial and non-custodial interrogation this court has singled out certain criteria as having special significance: these include probable cause to arrest, subjective intent of the police, subjective belief of the defendant, and focus of the investigation.[7] Although none of these factors is alone determinative, we have recently indicated that the most compelling is whether or not the focus of the investigation has finally centered on the defendant."

ment which Mandujano was entitled to plead. Thus, if the attorney proceeded to question actually anticipating an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury. The likelihood of Mandujano confessing a crime before the grand jury was certainly de minimis. The inference is easily drawn that the attorney's questioning was primarily baiting Mandujano to commit perjury. As perceived by the district court this case "smacks" of entrapping Mandujano to incriminate himself or commit perjury. His only "safe harbor" was to remain silent—a right of which the government failed to inform him.

The government asserts that since Mandujano negotiated for a heroin sale with the federal narcotics agent which did not result in a distribution due to appellee's being unable to procure heroin from his sources, therefore the government agents concluded that appellee must have had knowledge of a source for heroin. Consequently he was called before the grand jury only to obtain intelligence regarding known heroin sources, consistent with the purposes of the grand jury, and not in an attempt to obtain incriminating or perjurous statements from him. Nevertheless, as concluded by the district court, "the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution." Moreover, the questions tendered by the government attorney simply could have inquired whether Mandujano knew any heroin dealers rather than focusing on whether anyone had ever solicited heroin from him.

Moreover, the warnings that were given were not adequate advisement even of the appellee's Fifth Amendment rights against self-incrimination. As

pointed out by the trial court, the questioning attorney "stressed not the right to remain silent, but the requirement that the defendant answer all the questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially [here certainly] damaging question."

Under the circumstances of this case, this Court agrees that Mandujano was a putative defendant in custody and was entitled to *Miranda* warnings.

II. Remedy for Failure To Give Miranda Warnings

The more difficult issue here is whether the usual remedy for failure to give constitutional warnings, i.e., suppression of the testimony, can ever be employed in a situation where the testimony itself amounted to perjury.

Appellant relies heavily on United States v. Orta, 253 F. 2d 312 (5th Cir. 1958), to convince us that "[u]nder no circumstances" can a grand jury "witness" commit perjury and then successfully claim that the Constitution affords him protection from prosecution for that crime. Witness Orta was charged with having committed perjury at a grand jury investigation. The district court suppressed Orta's grand jury testimony, but this Court reversed, broadly stating, *supra* at 314:

> It is clear that the protection of the Fifth Amendment relates to crimes alleged to have been committed before the time when the testimony is sought. A *witness*, ignorant and uninformed of his constitutional rights, would not intelligently waive them if he testifies, thinking that he was compelled to do so. He might answer truthfully and thereafter assert the constitutional guaranty. *Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime.* As said in Glickstein v. United States, 1911, 222 U.S. 139, 142, 32 S. Ct. 71, 73, 56 L. Ed. 128; '* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'
>
> The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In United States v. Scully, 2 Cir., 1955, 225 F. 2d 113, 116, the Court of Appeals for the Second Circuit held:
>
> '* * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.'
>
> That holding is applicable to the present record. *There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified.* (Emphasis supplied).

Although clearly holding that a mere "witness" uninformed of his rights before the grand jury, even one concerning whom there is a "mere possibility" of indictment, may not commit perjury with impunity, the *Orta* court sounded the important caveat that the question of supervision of the conduct of government representatives in the interest of fairness may be debatable in some circumstances. The language in the *Orta* opinion, *supra* at 314,

> "There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified,"

highlights the important distinction between *Orta* and this case, demonstrating the wisdom of the caveat concerning the court's duty of supervision "in the interest of fairness." The instant case does not involve a mere "witness," but a putative, and subsequently actual, defendant. The facts showed that there was a mere possibility that a witness may later be indicted, but that the government deliberately subpoenaed a putative defendant before the grand jury primarily for the purpose of obtaining incriminating or perjurous statements against him and mainly in order to elicit evidence helpful in indicting him. Several decisions of this Court, such as *Orta, Daniels, Glasco, Stassi* and *Wilcox,*[1] have involved perjurous testimony and the adequacy of the instruction as to constitutional rights; however, the precise issue of a putative defendant who was primarily called before the grand jury for the purpose of obtaining incriminating or perjurous statements and mainly in order to elicit evidence helpful in indicting him has not been presented to this Court. Although there are factually overlapping features of the cases to be discussed, we have concluded that the totality of circumstances in the case at bar calls clearly for this Court to affirm the district court's suppression of Mandujano's testimony before the grand jury.

[2] As heinous as the crime of perjury is under our law, and as correct as the *Orta* principle is, that a witness uninformed of his constitutional rights generally should not be afforded a license to commit per-

[1] *United States* v. *Orta*, 253 F. 2d 312 (5th Cir. 1958); *United States* v. *Daniels*, 461 F. 2d 1076 (5th Cir. 1972); *United States* v. *Glasco*, 488 F. 2d 1068 (5th Cir. 1974); *Stassi* v. *United States*, 401 F. 2d 259 (5th Cir. 1968); *United States* v. *Wilcox*, 450 F. 2d 1131 (5th Cir. 1971).

jury, under our law, we simply cannot ignore the unfairness in baiting this defendant before the grand jury and overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it seeks to guard. In order to deter the prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurous testimony, the accused must be adequately apprised of his rights, or all of his testimony, incriminating and perjurous, will be suppressed. In order to combat these methods the Fifth Amendment privilege must be fully honored in this situation. This end entails only slight erosion of the general principle announced in *Orta*. This deviation in the situation of a putative defendant uninformed of his *Miranda* rights and called for the purpose of obtaining incriminating or perjurous testimony is necessary to counteract the fundamental unfairness of allowing a defendant to be faced by such a Hobson's choice.

In distinguishing *Orta,* we distinguish the other cases, cited above rendered after the date of *Miranda,* which reaffirmed the *Orta* principle (pre-*Miranda*), as none of these decisions concerned the situation of a putative defendant entitled to, but unadvised of, his *Miranda* warnings. The problem here is the problem adverted to in the *dictum* in *Orta,* and not the problem *adjudicated* by the *Orta* holding or by any other decisions of this Court. As previously indicated, the grand jury was not seeking to indict Orta and Orta was not a putative defendant, entitled to *Miranda* warnings. Orta was an ordinary witness entitled to a general Fifth Amendment warning.

The district court apparently determined that in view of the subsequent holding in *Miranda,* there was

now an essential difference between a *prosecution* for perjury when there have been no *Miranda* warnings and the *suppression of testimony* under the exclusionary rule, when such warnings have not been given, i.e., that although the indictment could not have been dismissed, the testimony could nonetheless have been suppressed. This distinction would be a facile solution to the difficult question here, were it not for the language in United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974), intervening between the district court's decision in the case at bar and the instant appeal, indicating that *Orta* had "post-*Miranda* vitality." In *Glasco* the defendant *witness,* who was in custody for another crime, had perjured himself when testifying in the trial of another defendant and the court held that a motion to suppress was properly denied. Again, however, *Glasco* concerned entirely different facts, and an entirely different procedure. Glasco was not put up as a witness to give evidence incriminating himself. He had already pleaded guilty to the same offense. Here, the agent reported that he believed Mandujano had committed the narcotics offense charged in count 1, and the government proceeded to subpoena Mandujano before the grand jury and asked him the precise questions dealing with a transaction that led to his being indicted by this same grand jury. Moreover, since Glasco appeared at a trial as a defense witness, he apparently appeared voluntarily and not by the compulsion of a subpoena issued on behalf of the government.

Furthermore, the two cases cited in *Glasco, Wilcox* and *Stassi,* also involved factual circumstances so dissimilar from those of the instant case that they need not be discussed. Both cases quoted from the *Orta* opinion.

One final case, United States v. Daniels, 461 F. 2d 1076 (5th Cir. 1972), which was noted by the district court, discusses the applicability of *Orta* to persons who commit perjury before a grand jury. Grand jury witness Daniels signed a "Waiver of Privilege Against Self-Incrimination" which advised that a witness could consult with an attorney outside the grand jury room but contained no statement with respect to the appointment of counsel for indigent witnesses, and proceeded to give perjurious testimony to the grand jury. Daniels conceded that generally there is no right to counsel for ordinary witnesses appearing before the grand jury, but argued that when an indigent witness who is advised that he may have an attorney present, must also be advised that if he is unable to provide his own counsel, one will be appointed for him free of cost. Finding that Daniels was "only a witness" and "was not under indictment when he appeared," the court held that he was not entitled to appointed counsel. The important distinguishing factors are that Daniels did not argue that he was entitled to *Miranda* warnings, but only contended that since a witness could have retained counsel, he should have been advised that indigent witnesses may have appointed counsel free of cost. Furthermore, the court clearly delineated that Daniels was only a witness and not a putative defendant. Therefore, the latter portion of the decision which concludes that Daniels, even if entitled to counsel and deemed not to have waived his rights, would still have no license to perjury is a reaffirmation of the general principle announced in *Orta* and is to be distinguished completely from the situation of a putative defendant entitled to *Miranda* warnings who is called before the grand jury for the purpose of obtaining incriminating or perjurous testimony.

We reiterate that the *Orta* principle that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury continues with full force. We only make a slight inroad that where a totally unfair procedure is put in train—as when there is a factual determination that a person who is subpoenaed before the grand jury and questioned about an alleged crime, was already known to the satisfaction of the prosecuting agency prior to the grand jury appearance to be guilty of that precise crime—, elemental fairness requires that such a person is under such compulsion as to require that he be given the *Miranda* warnings, and that failure to do so must require suppression of any incriminating testimony given by him even though he is being prosecuted for giving false testimony.

The remaining question arises from the principle that the Fifth Amendment protection against self-incrimination extends only to past acts, not to those that are or may be committed in the future. As stated in Glickstein v. United States, 222 U.S. 139, 32 S. Ct. 71, 56 L. Ed. 128 (1952), [quoted by the *Orta* court, as stated *infra*], "* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." The appellant urges that when the defendant Mandujano appeared before the grand jury, he had not committed the perjury and that his criminal liability concurred with his utterance before the grand jury. Therefore, the perjury indictment was not premised upon evidence of past acts obtained from the mouth of the defendant, but was based on a crime whose very commission, rather than evidence of commission, was the defendant's testimony. Glickstein v. United States,

supra, concerned a bankrupt who was indicted for perjury for having falsely sworn in a bankruptcy proceeding while under examination before a referee.

Once again, we must point to the distinguishing characteristics in the facts and the *proceedings* in this case. The entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissible prosecutorial conduct.*[8] We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment.

We, of course, do not attempt an axiomatic definition of due process, but note the well known language from Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1941), overruled on other grounds, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1962):

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Although the application of the standard set in Betts v. Brady, *supra,* was overruled in Gideon v. Wain-

[8] As did the trial court, we refrain from placing blame on any one official for what turned out to be conduct "smacking" of entrapment. We recognize the fact that involved here were an agent who reported to his superior, and then a special attorney having designated duties in the field of narcotics investigation and prosecution, and finally the United States Attorney and his staff. Somewhere within this chain of command and information, a decision was made to subpoena as a witness a man to whom the original agent testified he had given $650 for a "score," and to ask this witness about this specific transaction.

wright, *supra,* it is clear that the test remains the same. Was the conduct (refusal to appoint counsel) so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. 316 U.S. at 473.

We conclude simply that the proceedings here complained of met that standard.

We believe this not to be inconsistent with any prior decision of this Court, all of which dealt only with the specific rights guaranteed by the self-incrimination clause of the Fifth Amendment

The judgment is affirmed.

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

(No. 73-3353)

D.C. Docket No. CR SA 73 CR 163

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROY MANDUJANO, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before TUTTLE, COLEMAN, and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

JUNE 28, 1974.

Issued as mandate: October 24, 1974.
A true copy:

Test: EWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.
By CLARE F. SACHS,
Deputy.

New Orleans, Louisiana

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

(No. 73-3353, 73-3356)

D.C. Docket No. CR SA 73 CR 163

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

RAY MANDUJANO, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PAUL GONZALES RANGEL, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before TUTTLE, COLEMAN, and AINSWORTH, Circuit Judges.

ORDER

The petition for rehearing is denied, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Ap-

pellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

Issued as mandate: October 16, 1974.

A true copy:

Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.
By CLARE F. SACHS,
Deputy.

New Orleans, Louisiana.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX D

United States District Court
Western District of Texas
San Antonio Division

[Filed September 21, 1973]

Criminal No. SA73CR164, SA73CR163

UNITED STATES OF AMERICA

v.

PAUL GONZALES RANGEL

UNITED STATES OF AMERICA

v.

ROY MANDUJANO

OPINION

This matter involves the defendants' separate motions to suppress their testimony before the special grand jury which was convened on May 2, 1973. The two cases before the Court, though not consolidated, and not involving the same transaction, embody virtually identical sets of circumstances. Each defendant is charged in a two count indictment with an attempt to distribute heroin in the first count, and with perjury before the grand jury in the second count. The indictment for perjury in each case (count two) is based upon each defendant's denial before the grand jury of any attempt to sell heroin, or any solicitation to do so, while count one alleges that each defendant did in fact make just such an attempt to sell to drug

enforcement officials. Both alleged attempts took place prior to the defendants' grand jury appearances.

As to defendant Rangel, the indictment alleges that he attempted to distribute three ounces of heroin on or about the 8th day of December, 1972. The record reflects that a federal narcotic agent in December of 1972 attempted to purchase three ounces of heroin from him, and discussions about money for the supposed drugs took place, though no money ever changed hands.

With respect to the defendant, Mandujano, the indictment alleges that he attempted to distribute one ounce of heroin on or about the 29th of March, 1973. A different federal narcotic agent testified that in March of 1973 he made contact with Mandujano, and offered him money for the purchase of heroin, giving him $650 for the alleged attempted purchase.

Defendants maintain that the above interrogration by the special attorney for the Drug Enforcement Administration before the grand jury intentionally tracked the exact facts of the actual contact between federal narcotic agents and the defendants, and that the questions were asked as a continuing part of an investigation of the narcotics activities of the defendants.[1] The agents involved, and the government at-

[1] When the special attorney for the Drug Enforcement Administration questioned Rangel before the special grand jury, the following exchange took place:

Q. Have you ever offered to sell heroin, get heroin for someone?

A. No, sir.

Q. Let me ask you specifically have you at any time within the last four months, five months, since December 1st last year, the month Christmas was in, have you since then at any time sold any heroin to anyone——

A. No, sir, I haven't.

torney who appeared before the grand jury, testified that they had discussed the circumstances of the

Q. For money? Have you offered to sell heroin to anyone during that period?

A. (Nod negative.)

Q. Have you talked with anyone since December 1, 1972, about getting them some heroin——

A. No, sir.

Q. Or selling some heroin?

A. (Nod negative.)

Q. I want to make this clear to you. I think—in fact I know I told you at the the outset that we will ask you certain questions and if you make a statement, you are under oath and Mr. Tarbutton, the foreman of the grand jury, who asked you to raise your right hand tell the truth, the whole truth and nothing but the truth—We have asked you questions and if you have lied to us, in other words if you have made a false answer, false statement in response to some of these questions I have asked you, particularly those I have just asked you about heroin, having heroin, selling heroin or trying to get heroin to sell for somebody, if you made a false statement and we prove it is false, you have committed a felony, a federal felony. Do you understand that?

A. Yes, sir, I do.

Q. With that in mind do you still make the same answer to the questions I have asked you about the sale?

A. Yes, sir . . .

A member of the grand jury then asked:

Q. Let's go back just a little bit there, Mr. Rangel, back in December, four months ago, five months ago, December of 1972——

A. Yes, sir.

Q. Before Christmas a couple of weeks. Did you at any time offer to obtain some heroin for someone that came to see you?

A. No, sir.

Q. Your nickname is Payo?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

(Continued)

attempted buys in preparation for the appearance of Rangel and Mandujano before the grand jury. Given

(Continued)

The defendant Mandujano was asked the following questions, among others:

Q. Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. In other words, no one has ever come up to you and wanted to buy heroin?

A. No, sir.

Q. And you have never told anybody that you would try to get heroin to sell to them?

A. No, sir.

Q. Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year.

A. I don't understand you, sir.

Q. Have you talked to anybody about selling heroin to them during the last year?

A. No, sir.

Q. You are sure about that?

A. I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q. Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A. No, sir.

Q. Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A. No, sir.

Q. No one has ever given you any money——

A. No.

Q. —to go buy them heroin?

A. No, sir . . .

Q. In other words, if you had $650 right now——

A. Yes, sir.

Q. —do you think you would be able to purchase an ounce of heroin?

the nature of the investigation and the questions asked before the grand jury, the defendants maintain, and this Court agrees, that full *Miranda* warnings should have been given to the two individuals who were in the position of "putative" or "virtual" defendants.

The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant(s) and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants.[2] The government had in fact already attempted to make a case against each defendant. Note

[2] It seems more than coincidence that when the special attorney questioned defendant Mandujano about buying one ounce of heroin, he offhandedly mentioned the exact amount of money offered Mandujano by the special agent when that agent attempted to buy from Mandujano.

too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer, and defendant Rangel was promptly cautioned again about the penalty for perjury. Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment. Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offered to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See *United States* v. *Leighton*, 265 F. Supp. 27 (S.D. N.Y. 1967), *cert. denied*, 390 U.S. 1025 (1968); *United States* v. *Montos*, 421 F. 2d 215 (5th Cir.), *cert. denied*, 397 U.S. 1072 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them.

The fact that defendants may have subjected themselves to serious risk of prosecution for perjury, or for the substantive attempt to sell heroin, does not necessarily bar further use of their testimony. Certainly, if they had received full *Miranda* warnings during the initial phase of their appearance before the grand jury, but had continued to willingly testify, then their testimony would very likely have constituted a voluntary waiver of the right to remain silent. The Fifth Circuit has recently restated the well

recognized rule that "a potential defendant may be subpoenaed to appear before a grand jury and be subsequently indicted without violating the self incrimination proscription, if he testifies voluntarily." *United States* v. *Morado*, 454 F. 2d 167, 172 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972).

This Court finds that neither defendant made a complete, knowing, and intelligent waiver of the right to remain silent, nor was either defendant properly apprised of that right, or of his right to appointed counsel outside the grand jury room. As to defendant Rangel, the statement of the right to remain silent was so garbled as to be highly suspect, especially in the context of the following complete excerpt from the transcript:

> Now anytime I ask you a question and you feel the answer would tend to incriminate you, you have a right to refuse to answer that question, but you can't refuse to answer a question if it is not—if the answer would not tend to incriminate you. In other words, you would be in contempt of court. Do you understand what I mean by incriminate you?

Besides the convolution of the double negative in the foregoing language, that warning, as administered to defendant Rangel, contains an implicit threat which all but negates the warning of the right to remain silent. The special attorney examining the defendant did not suggest to Rangel that he *could* be held in contempt, if he wrongly refused to answer. Instead he told the defendant that he *would* be held in contempt, if he made the wrong guess as to the incriminating nature of an answer. The explanation by the special attorney thus carried a strong implication that any doubt as to the incriminating nature of a response should be resolved by the defendant in favor of an-

swering, instead of in favor of silence. Judgments about the actual incriminating nature of a statement present great difficulties even for attorneys well versed in the law, so, as a general rule, they advise clients to opt for silence whenever any doubt exists. It is certainly unrealistic, as well as unfair, to require a putative defendant, who is not learned in the law, to choose between "incriminating" and "non-incriminating" answers, especially in the somewhat imposing environment of the grand jury room, unless he has been fully, completely and unambiguously advised of his right to remain silent, and voluntarily waives that right.

This Court has equal difficulties with the warning given defendant Mandujano:

> Q. "Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury.

Here the questioning attorney stressed not the right to remain silent, but the requirement that the defendant answer all of the questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially damaging question, but instead stressed the penalty for perjury. As the Supreme Court said in

Johnson v. *Zerbst*, 304 U.S. 458, 464 (1938), "'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."

The government has argued strenuously that witnesses before the grand jury are entitled to no *Miranda* warning whatsoever, *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir.), *cert. denied*, 389 U.S. 838 (1967); *United States* v. *Orta*, 253 F. 2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958); *United States* v. *Scully*, 225 F. 2d 113, 116 (2nd Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States* v. *Wolfson*, 294 F. Supp. 267 (D. Del. 1968), but the defendants in the instant case were not ordinary "witnesses" when they entered the grand jury room.

It is significant that in many cases upholding indictments brought subsequent to appearances before grand juries, the defendants were clearly warned of their right to remain silent and their right to counsel. *United States* v. *DiMichele, supra,* held only that *Miranda* warnings were not required in the grand jury room itself, especially in light of the fact that the defendant had already been "fully advised of his right to remain silent and to counsel."[3] Most cases where grand jury testimony has been challenged as violative of witnesses' Fifth and Sixth Amendment rights have involved clear and complete warnings on the part of the government prosecutor. In *United States* v. *Corallo*, 413 F.2d 1306, 1329 (2nd Cir.), *cert. denied*, 396 U.S. 958 (1969), the warning given stressed the right to refuse to "answer any questions the grand jury may ask you today, the answers to which you feel . . . tend to incriminate you personally." This is unlike the present case in which the warning stressed instead the compulsion to testify.

---

[3] 375 F. 2d at 960.

In addition, the witness in *Corallo* was cautioned that if the questions were answered, they might be used against him in a court of law. In all fairness, this Court believes that such a warning would have been not only instructive, but highly appropriate in the circumstances of this case. In *United States* v. *Potash,* 332 F. Supp. 730 (S.D. N.Y. 1971), the witness was warned that he had an absolute right under the Fifth Amendment to refuse to answer incriminating questions, and "if you cannot afford an attorney, you have the right to have an attorney appointed free of charge, to remain outside the grand jury room and you may consult with him prior to answering any of my questions."[4]

The Sixth Circuit has clearly held that when a witness before a grand jury is "virtually in the position of a defendant", then he must be advised of his right to refuse to answer incriminating questions, and that anything he says may be used against him. *United States* v. *Luxenberg,* 374 F. 2d 241 (6th Cir. 1967). In *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio 1968), *cert. denied,* 400 U.S. 849 (1970), the Court explored the meaning of the "virtual defendant" language, and, in circumstances very similar to the instant case, found the witness to be a virtual defendant. In *Fruchtman* the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning. Yet the Court noted that the same attorney had read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are very similar to those in the in-

[4] 332 F. Supp. at 733 n.3 (1971). *See also United States* v. *Irwin,* 354 F. 2d 192, 199 (2nd Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *United States* v. *DiGiovanni,* 397 F.2d 409 (7th Cir.), *cert. denied,* 393 U.S. 924 (1968).

stant case, where the special government attorney read the narcotics agents' reports prior to the grand jury session.[5]

Although the Fifth Circuit has not expressly dealt with the full scope of *Miranda* in the context of grand jury investigations, *Mattox* v. *Carson,* 424 F. 2d 202 (5th Cir.), *cert. denied,* 400 U.S. 822 (1970), it did examine the problem to some extent in *United States* v. *Morado,* 454 F. 2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972), where, without indicating whether it would agree with the "virtual defendant" concept, noted the Sixth Circuit's emphasis upon "the same factor we have considered to be of prime importance in determining whether or not a man is 'in custody', as that term is used in *Miranda:* has the 'focus' of the investigation centered upon him?"[6] The Court then indicated its sympathy with the idea that if the investigation had passed beyond the stage of a general inquiry into an unsolved crime or a suspected conspiracy, and had focused upon the defendant as someone whom the government planned to indict, and against whom it was gathering incriminating evidence, then the defendant would be in the position of the "virtual defendant". This Court finds the lan-

[5] "Although the Government contends that it did not at the outset intend to obtain an indictment against defendant as a result of his testimony, it does not appear that the examination would have been conducted any differently if it had * * * [A] man's rights do not depend on the subjective intent of the prosecutor, nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law." 282 F. Supp. at 536 (1968).

[6] Many courts have found that grand jury investigations of witnesses who later became defendants were not custodial interrogations. See *e.g., United States* v. *Morado,* 454 F. 2d 167, 173 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972); *United States* v. *McGinnis,* 344 F. Supp. 89 (S.D. Tex. 1972).

guage of the Fifth Circuit in *Morado* especially applicable in the instant case, where there was no basis (other than hope) for the perjury count of the indictment until after the grand jury appearance. The fact that the questioning attorney immediately pounced upon each defendant's denial that he had been contacted about sales of heroin, indicated a clear and direct focus upon Rangel and Mandujano as future defendants.

Under the circumstances of this case, this Court finds that Rangel and Mandujano were putative defendants as outlined in the "virtual defendant" rule of the Sixth Circuit, and holds that both witnesses had a right to be warned of their right to remain silent in regard to any question which might tend to incriminate them; that any testimony given might be used against them in a court of law; and that if either of them wanted an appointed attorney he had a right to have one available to him for consultation outside the grand jury room.[7]

[7] Actually, Mandujano told the special attorney that he didn't have the money to get a lawyer. The exchange during the grand jury proceedings between Mr. Mandujano and the questioning special attorney included the following:

Q. Have you discussed your presence here with anybody?

A. My wife.

Q. Have you contacted a lawyer in this matter?

A. No sir, I haven't.

Q. I take that to mean then that you do not wish the services of a lawyer here today?

A. I don't have one. I don't have the money to get one.

Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A. Yes, sir.

This Court agrees with the argument that as a matter of policy a *de jure* or *de facto* defendant should never be called before a grand jury, unless, of course,

Q. Is that clear?

A. (Nod affirmative).

Mr. Rangel was asked the following questions:

Q. You are not under arrest.

A. I know, sir.

Q. You know that. As far as I know there are no warrants out for your arrest. You have a right to an attorney if you want one. Do you have an attorney?

A. He didn't tell me anything. They just gave me the subpoena.

Q. No. I say, did you talk to an attorney after you got the paper, the subpoena?

A. No, sir. I didn't.

Q. You have the right to an attorney if you want one. He can't be in here with you. The rules wouldn't permit it, but he could be outside and you could talk to him anytime you want to.

At no time was either defendant told that an attorney would be furnished him free of charge if he was financially unable to employ one. This Court finds the words of the Fifth Circuit in *Irving* v. *Breazeale*, 400 F.2d 231, 235 (1968) especially telling in this regard: "An accused cannot be found to have waived a right if he was not aware that he had it. Thus it is not sufficient merely to ask an indigent defendant whether he wants a lawyer. If he is unaware that counsel will be appointed whether he can afford to pay or not, he will not likely say that he wants a lawyer even if he thinks he needs one."

It should be noted that a Criminal Justice Act Guideline Approved by the Judicial Conference of the United States in September 1973 provides:

> "When a judge appoints counsel for a witness before a grand jury under the terms of the Criminal Justice Act in cases in which the witness faces loss of liberty, such appointment shall be deemed to be an appointment under the general terms of the Act rather than under the terms of subsection (g) and that ordinarily such appointment should be considered to be an appointment in a misdemeanor case."

he volunteers to testify.[8] But if a defandant or putative defendant is called to appear before the grand jury, the very least that should be accorded him is a full and complete recitation of his constitutional rights in order to make certain that if he does testify his testimony will have been given knowingly, voluntarily and intelligently.

This Court does not suggest that every *witness* before a grand jury has a *right* to appointed counsel present outside the grand jury room,[9] but when an indigent witness requests that counsel be appointed to assist him, it may be a wise policy to comply with such request.[10] However, in the case of a virtual or putative defendant, the exercise of proper judgment as to the incriminating effect of any answers before the grand jury becomes doubly important. In such a case the right to counsel would be an empty one indeed if those capable of retaining a private attorney could consult with them outside the grand jury room, but those unable to pay, but equally subject to the penalties of the criminal law, could not.

Both incriminating testimony and testimony later

[8] "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this Court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit." *United States* v. *Scully*, 225 F.2d 113, 116 (2nd Cir.), *cert. denied*, 350 U.S. 897 (1955). *See also United States* v. *Messitte*, 324 F. Supp. 334, 338 (S.D.N.Y. 1971).

[9] See *United States* v. *Daniels*, 461 F. 2d 1076 (5th Cir. 1972); *United States* v. *DeSapio*, 229 F. Supp. 436, 440 (S.D.N.Y. 1969).

[10] *See generally* Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966).

proved to be perjurous have been upheld as admissible when a defendant has been fully advised of his constitutional rights. *United States* v. *Potash*, 332 F. Supp. 730, 732 (S.D.N.Y. 1971), *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968). There is no appreciable difference between the suppression of incriminating substantive evidence given before a grand jury in the absence of warnings, and the suppression of perjurious testimony given under the same circumstances. The Fifth Circuit, eight years before *Miranda*, stated that "under no circumstances, however, could [a witness] commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime." *United States* v. *Orta*, 253 F. 2d 312, 314 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958),[11] and *United States* v. *Daniels*, 461 F. 2d 1076, 1077 (5th Cir. 1972). But in view of the subsequent holding in *Miranda*, there is an essential difference now between a *prosecution* for perjury, when there have been no *Miranda* warnings, and the suppression of testimony under the exclusionary rule, when such warnings have not been given. This crucial difference between the dismissal of an indictment and the suppression of testimony, which otherwise might be

[11] In *Orta* the Court appeared to make a distinction between the consequences of a witness (unwarned of his right to remain silent) choosing to testify falsely rather than in a truthful though incriminating manner. The Court held that the Fifth Amendment would protect the witness from the truthful, incriminating statement, but if the witness testified perjurously, then the Fifth Amendment would offer no protection: "As said in *Glickstein* v. *United States*, 1911, 222 U.S. 139, 142. . . . '* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'"

utilized in a prosecution, has been noted by the courts in different contexts many times.[12] In short, the proper remedy for testimony acquired in the absence of *Miranda* warnings is the suppression of the testimony and not the dismissal of the indictment.

One obvious purpose of *Miranda* was to avoid putting a defendant to the Hobson's choice of either incriminating himself or lying. In the case of the putative defendant who has not been properly warned of his rights, the only choice available to him apparently lies between incriminating himself or giving false testimony. *Miranda* would be vitiated if the government, by failing to give the warnings, could force the witness to guess as to which type of testimony is properly protected under the Fifth Amendment. In that event, an incorrect guess by such a witness would clearly constitute a situation in which he would have been "compelled to be a witness against himself."

While this Court agrees that the issuance of a subpoena to appear before a grand jury is not inherently coercive, *United States* v. *Cleary*, 265 F. 2d 459 (2nd Cir. 1959), it is quite obvious here that the defendants may very well have perceived themselves under an apparent compulsion to testify, a situation which falls within the ambit of custodial interrogation by virtue of the investigation having focused on them,[13] thus depriving them of "freedom of action in [a] significant way."[14]

---

[12] See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Mattox* v. *Carson*, 424 F. 2d 202 (5th Cir.), *cert. denied*, 400 U.S. 822 (1970); *United States* v. *Wolfson*, 294 F. Supp. 267, 275 (D. Del. 1968).

[13] *Escobedo* v. *Illinois*, 378 U.S. 478, 485, 492 (1964).

[14] *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966).

As was pointed out in the case of *In Re Kelly*, 350 F. Supp. 1198 (E.D. Ark. 1972), courts cannot legitimately and fairly distinguish the appearance of some witnesses before the grand jury from the appearance of others based merely upon the expressed subjective intent of government attorneys. Long after presentment, and a grand jury vote upon an indictment, it becomes extremely difficult for even the most attentive attorney to recall exactly that moment when his view toward an individual changed from the impartial questioning of a witness to the sharp inquisitorial search directed toward a prospective defendant. See also *United States* v. *Kreps*, 349 F. Supp. 1049 (W.D. Wis. 1972).

If decisions as to the rights to be afforded an individual turned strictly upon the exact time of indictment, or presentment, of a case to a grand jury, or commencement of an investigatory file, simple delay of time of indictment would subvert *Miranda* to the point where it would be meaningless. When it is clear that an individual is being questioned with an eye to possible prosecution, and when an investigation has narrowed to close inquiry concerning that individual's behavior, as distinguished from his knowledge of activities performed by others, then that individual should be fully and carefully advised of his rights.

As a practical matter, this Court does not see that any undue burden would be placed upon the functions of the grand jury if *every* witness were fully advised as to the *Miranda* rights. Many witnesses enter the grand jury room already knowing the importance and meaning of the right to remain silent. For them, a *Miranda* warning does not impede the investigatory process in the least. And those who enter the grand jury room without such knowledge of their rights have no less right to remain silent with respect to

matters which might tend to incriminate them, or to consult counsel than their more informed counterparts; and pursuant to the concept of "equal justice under law", the government has no valid right to expect, as a matter of course, to be allowed to take advantage of the status of the less informed as an aid in its investigation and prosecution.

Considering all of the facts surrounding the appearance of Roy Mandujano and Paul Gonzales Rangel before the May 1972 special grand jury, this Court finds and ORDERS that their testimony before said grand jury be and the same is hereby suppressed.

Entered the 21st day of September, 1973.

ADRIAN A. SPEARS,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
MAY 8 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 16, 1974
CERTIORARI GRANTED MARCH 24, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA,

Petitioner

—v.—

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX[1]

	Page
Relevant Docket Entries	1
Indictment	2
Respondent's Testimony Before the Grand Jury	5
Respondent's Motion to Suppress	23
Government's Answer to Pre-Trial Motions	26

---

[1] The opinion of the court of appeals may be found in Petitioner's Appendix A, pp. 1A-20A.

The judgment of the court of appeals may be found in Petitioner's Appendix B, pp. 21A-22A.

The order of the court of appeals denying rehearing may be found in Petitioner's Appendix C, pp. 23A-24A.

The opinion of the district court may be found in Petitioner's Appendix D, pp. 25A-42A.

Page

Exerpts from the Transcript of the August 24, 1973 Pre-Trial Hearing 35

Exerpts from the Transcript of the August 28, 1973 Pre-Trial Hearing 37

Order Granting Certiorari 56

RELEVANT DOCKET ENTRIES

June 13, 1973 —Indictment filed. Sealed.

* * * *

July 23, 1973 —Motion for Suppression of Testimony Before Grand Jury and Memorandum Brief filed.

* * * *

July 27, 1973 —Answer to Defendant's Pre-Trial Motions filed.

* * * *

August 24, 1973 —Hearing on all pending motions passed.

* * * *

August 28, 1973 —Hearing on Motions.

* * * *

September 4, 1973—Order on Motions filed.

* * * *

October 12, 1973 —Amended Opinion filed.

* * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Crimina! No. ————

UNITED STATES OF AMERICA, PLAINTIFF

vs

ROY MANDUJANO, DEFENDANT

INDICTMENT

Vio: 21 USC § 846: Attempt to distribute heroin; 18 U.S.C. § 1623: False statement

THE GRAND JURY CHARGES:

COUNT ONE

[21 USC § 846]

On or about the 29th day of March, 1973, in the Western District of Texas, ROY MANDUJANO, the defendant herein, did knowingly and intentionally attempt to distribute one ounce of heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1), all in violation of Title 21, United States Code, Section 846.

COUNT TWO

[18 USC § 1623]

1. That, on the 2nd day of May, 1973, in the Western District of Texas, ROY MANDUJANO, the defendant herein, under oath as a witness in a proceeding before a Grand Jury, duly impanelled and sworn in the United States District Court for the Western District of Texas and, inquiring in a matter then and there pending before

the said Grand Jury, did willfully and knowingly make a false material declaration, that is to say:

2. That, at the time and place aforesaid, the Grand Jury, inquiring as aforesaid, was conducting an investigation to determine whether there were violations of the narcotics, internal revenue or firearms laws of the United States and any other criminal statute of the United States.

3. That it was material to the aforesaid investigation to determine the nature and extent of any involvement in the trafficking of heroin by ROY MANDUJANO, the defendant herein.

4. At the time and place alleged in paragraph 1 herein, ROY MANDUJANO, the defendant herein, appeared before the aforesaid Grand Jury, and, while testifying under oath, made the following false declarations which he knew to be false and which were in respect to the aforesaid material matter:

"Q. Have you talked to anyone about selling heroin to them during the last year?
A. No, sir.
Q. And you have never told anyone that you would try to get heroin to sell to them?
A. No, sir.
Q. No one has ever given you any money . . .
A. No.
Q. . . . to go buy them heroin?
A. No, sir."

5. The aforesaid declarations of ROY MANDUJANO, the defendant herein, as he then and there well knew, were false in that:

ROY MANDUJANO, the defendant herein, had, on March 29, 1973;

(1) Had a discussion with an undercover officer of the Office for Drug Abuse Law Enforcement concerning the possibility of selling heroin to the said officer;

(2) Told the aforesaid undercover officer that he would attempt to get a quantity of heroin to sell to the said officer;
(3) Been given a sum of money by the aforesaid undercover officer for the purpose of purchasing heroin for the said officer.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

_____

Foreman of the Grand Jury

WILLIAM S. SESSIONS
United States Attorney

By: _____
Assistant United States Attorney

TESTIMONY OF RESPONDENT BEFORE THE GRAND JURY

[2] WHEREUPON the said ROY MANDUJANO, having first been duly sworn, testified as follows:

EXAMINATION

QUESTIONS BY MR. LUCKEL:

Q Are you wearing prescription glasses?
A No, sir.
Q Would you please remove them?
A (Witness did as requested).
Q Okay. Thank you. Mr. Mandujano, my name is Eb Luckel. I'm a Special Attorney employed by the Department of Justice. The ladies and gentlemen that you see here today are members of a Special Federal [3] Grand Jury and this Grand Jury is looking into violations of various laws including narcotic laws, internal revenue laws and firearm laws. In fact, this Grand Jury is empowered to go into any criminal law violation it may learn about. You are here today because you have been served with a subpoena. When did you get that subpoena?
A Sir?
Q When did you receive the subpoena, the piece of paper that told you to be here?
A Oh, I think last week.
Q Early in the week?
A Last week, yes, sir.
Q Now, that subpoena, that's what we call that white piece of paper, that insures that you will be here today and this Grand Jury will be asking questions to you mainly through me but also some of the jurors may ask questions. Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
A Do I answer all the questions you ask?

Q You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

[4] A Yes, sir.

Q You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?

A Yes, sir.

Q Have you discussed your presence here with anybody?

A My wife.

Q Have you contacted a lawyer in this matter?

A No, sir, I haven't.

Q I take that to mean then that you do not wish the services of a lawyer here today?

A I don't have one. I don't have the money to get one.

Q Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A Yes, sir.

Q Is that clear?

A (Nod affirmative).

[5] Q Now, Mr. Mandujano, we are planning to ask you questions today. We think you can give us information that will be helpful to the Grand Jury. Of course, we want your honest answers to all these questions. First of all, sir, where do you reside now?

A Well, I'm living with my uncle.

Q Where?

A With my uncle.

Q And what is the address?

A 2217 Guadalupe.

Q What is your uncle's name?

A Telesforo Mandujano.

Q Could you please spell that first name?

A F-o-r-r-o.

Q That's it?

A Yes, sir.

MEMEBR OF THE GRAND JURY: T-e-l-e-s-f-o-r-o.

QUESTIONS BY MR. LUCKEL:

Q Who lives there besides your uncle and you?

A Me and my wife.

Q What is her name?

A Elva.

Q Elva? And do you have any children?

A Yes, sir.

[6] Q Do they live there with you?

A No, sir.

Q Where do they live?

A With my mother.

Q Where does your mother live?

A 2171 Southwest 19th.

Q And how old are your children?

A Three years and four years.

Q Two children?

A Yes, sir.

Q And both of them live with your mother?

A Yes, sir.

Q Are you paying rent at your uncle's house?

A No, sir. I'm taking care of our boys. They live and sleep there.

Q Could you speak up?

A I'm taking care—I'm a bartender and I'm taking care of the place there and they don't charge me.

Q Whose place is that?

A My uncle and my brother.

Q Who is your brother.

A Thomas Mandujano.

Q And it is your brother and your uncle that own this place?

A Yes, sir.

[7] Q And where is that place?

A On Guadalupe street.

Q What address, please?

A 2217 Guadalupe.

Q 2270?
A Yes, sir.
Q And this is the address of the house or this is the address—
A Well, it is a bar.
Q It is a bar?
A Yes, sir.
Q Well, is there a room to live in also?
A No, sir.
Q Where do you live?
A Just inside. I just sleep there.
Q Same address?
A Yes, sir, same one.
Q And what work do you do at this place?
A I'm a bartender.
Q What is the name of it, by the way?
A Tally Ho and Foro's Lounge.
Q Tally Ho and what?
A Foro's Lounge.
Q Could you spell that last one?
A F-o-r-o. He doesn't have a name, but that's his name.
[8] They call it like that.
Q I see. Does he pay you a salary?
A Well, yes, sir.
Q How much?
A $60.
Q Every how often?
A Every week.
Q And out of this do you pay rent—
A No, sir.
Q —or does he just let you stay there?
A Yes, sir. But I work, you know, in two bars. He has got two bars and I work in his bar and my brother's bar, too.
Q The money you get though is $60 per week?
A Yes, sir.
Q How long have you been doing this?
A For three months and—for about four months last year and three months this year.

Q What is the name of the—never mind. You have answered that. Now, before you began working again at this bar—
A Yes, sir.
Q —where were you working or were you working?
A Well, I worked in refrigerators.
Q Doing what?
[9] A Refrigerators.
Q Doing what with them, fixing them?
A Yes, sir, fixing them.
Q Did you work for a company?
A No, sir, just for my father.
Q For your who?
A My father.
Q Is he in the business of repairing refrigerators?
A No, sir. He buys refrigerators from the houses, you know, and we fix them and sell them.
Q Does he pay you for that?
A Yes, sir.
Q How much?
A Well, five or ten dollars.
Q How long did you do that? Was that a job that you did every day?
A Yes, sir, for about five years.
Q Five years?
A Yes, sir. But I worked, you know, as a bartender every weekend, Friday, Saturday and Sunday.
Q Well, you have testified that you worked there the last three months.
A Yes, sir.
Q Before that you were working there on the weekends?
A Yes, sir, weekends last year and then the years [10] before that.
Q So the only two jobs you have had during the last five years are as a bartender and as repairing refrigerators?
A Yes, sir. I mean waiter, you know, in the tables, a bartender, like a bartender, like a waiter.

Q How much does this come to a month all the work that you do; how much do you usually earn a month?
A About—I don't know. I don't know.
Q Well, do you make $60 a week now as a bartender?
A I sometimes get 30 or 40, you know.
Q Is it safe to say that you don't make over 60?
A No, not more than that.
Q You never make more than $60 a week?
A Yes, sir. If I work there on the weekend and I sell a refrigerator or something, you know, I make more.
Q You sell these refrigerators after you repair them?
A Yes, sir.
Q How much—
A They fix them for a lady or like that and I take it back.
Q Do you pay anything for the support of your children?
A Yes, sir.
Q Regularly?
A Every week.
Q Every week?
[11] A Yes, sir.
Q You give your mother a check; is that how you do it?
A No. You know, I buy them milk and everything.
Q Do you ever give your mother cash?
A Yes, sir.
Q Every week?
A No, not every week but $10, you know, $5, you know, when I can, you know.
Q Do you have any income other than this income that you have told us about, selling refrigerators or from being a bartender or waiting on tables?
A Well, sometimes, you know, I do a little hustling, you know.
Q A little hustling?
A Yes, sir.
Q What would that be? I don't understand what you mean by hustling. Gambling or what?

A No, sir, not gambling. You know, like hustling, you know, like shoplifting and that. I used to make it. I don't make it no more.
Q You used to shoplift occasionally?
A Yes, sir.
Q And then when is the last time you have shoplifted?
A Well, last year in November.
Q Last year in November?
A Yes, sir.
[12] Q Were you arrested for it?
A Yes, sir.
Q They caught you?
A (Nod affirmative).
Q You haven't done that since?
A No, sir.
Q Do you have a case pending against you now?
A No, sir. Last year I went to court for that and they gave me time, you know, and I paid.
Q They gave you a fine?
A No, time.
Q How much time?
A They gave me three months.
Q Just three months. So you were in the penitentiary from November, December and January?
A No, sir, in the county jail.
Q In the county jail for three months beginning in November?
A Yes, sir, but not—last year, you know, I think in January, something like that.
Q Have you ever been convicted for any other offenses?
A Yes, sir.
Q What for?
A For burglaries and shoplifting and using drugs.
Q And for using drugs?
[13] A Uh-huh.
Q Have you been convicted on any of these—
A Yes, sir.
Q Other than this shoplifting case?
A Yes, sir.

Q How many times have you been convicted?
A One time.
Q That's for the shoplifting?
A No, sir, for burglary and for shoplifting and for drugs.
Q So one time for each you have been convicted for burglary?
A No, twice. I mean one time for burglary and one time for drugs.
Q And one time for drugs?
A Yes.
Q When was the drug offense?
A About 10 or 15 years ago.
Q 10 or 15 years ago? How old are you, sir?
A 33.
Q What drug was it 10 or 15 years ago?
A Heroin.
Q Did you have it—Were you trying to sell it or was it in your possession?
A No, I was selling and using. I sold to a man.
[14] Q Okay. And did you receive any time?
A Yes, sir.
Q And how much time did you receive?
A I served eight years.
Q You served eight years?
A Yes, sir.
Q In what jail?
A In—
Q Huntsville?
A Yes, sir, Huntsville and Ellis.
Q When did you get out of jail for this drug offense?
A Five years after.
Q You got out early?
A Yes, sir.
Q What year was that that you got out, do you remember?
A In '65.
Q Were you convicted of anything after that, after you got out?
A (Nod affirmative).
Q What for?

A For burglary.
Q When were you convicted for burglary?
A '66.
Q And how much time did you receive then?
A Two years.
[15] Q Two years?
A Yes, sir.
Q And when did you get out?
A In '67, I think.
Q In '67 you got out. And have you been convicted after that?
A Yes, sir.
Q For what?
A For shoplifting.
Q This is the time you just told me about?
A No, sir, about three or four times.
Q Three or four times for shoplifting?
A Yes, sir.
Q Okay. And do you presently use heroin yourself?
A No, sir. I'm not using anymore.
Q When did you stop using?
A About—well, I used to use, you know, but I started taking medicine and I stopped using it.
Q When did you stop, more than a year ago?
A Yes, sir—no, because I used in November of this year.
Q You stopped in November?
A No, sir. I stopped for eight months this year and then I started again and then I stopped again last year.
[16] Q How long has it been since you have shot up heroin?
A About three months or four months.
Q Well, was it before Christmas or after Christmas?
A No, before Christmas.
Q In other words you haven't shot up in 1973?
A No, sir, I have.
Q You have?
A Yes, sir.
Q How recently?
A About one time a week.

Q One time a week?
A Yes, sir.
Q Do you still shoot up that one time a week?
A No, sir, no more. I stopped for three months already or four months, going on four months. But I shoot one time before that.
Q Are you on any methadone program now?
A Yes, sir.
Q Which program are you on?
A On Presa Street.
Q Presa?
A Yes, sir.
Q Is that Dr. Payte's methadone clinic?
A Yes, sir.
Q On South Presa, right?
[17] A Yes, sir.
Q And do you go there daily?
A Yes, sir, every day except Sunday I think, one day.
Q And how long have you been on the methadone program?
A For about two years.
Q Two years?
A Yes, sir, two years or three years.
Q So during part of that time you were also shooting heroin while you were on the program?
A Yes, sir.
Q But it has been three or four months since you last shot?
A Yes, sir.
Q Now, all these shoplifting offenses and burglary, were you doing that in order to support your habit?
A Yes, sir.
Q And were you able to support your habit in that way?
A Yes, sir. You know, just, you know, I tried, you know, everything I could.
Q So did that take care of your habit; the things you stole you would sell?
A Yes, sir.
Q And get the money to buy the heroin I guess?
A Yes, sir.

Q When is the last time you bought any heroin?
[18] A About January, something like that.
Q About January?
A Yes, sir.
Q Now, did you tell me that this drug offense that you were convicted for long ago, you got out of prison I believe in 1965?
A Yes, sir.
Q That was for the sale of heroin?
A Yes, sir, for selling.
Q Now, I don't notice any other narcotics offenses. Once you got out in 1965 did you continue to sell heroin?
A No, sir.
Q Are you sure of that?
A Yes, sir, I just, you know, I just use it, you know, in shoplifting and hustling.
Q In other words, you don't sell any heroin—
A No, sir.
Q —to get money to buy your heroin?
A Sir?
Q You do not sell any heroin yourself—
A No, sir.
Q —in order to get enough money to buy heroin that you use or used to use?
A No, sir. I used to shoplift all the time.
[19] Q And that took care of all your money?
A Yes.
Q All the money you needed to buy your heroin?
A And working.
Q Well, when is the last time you have sold heroin then?
A I haven't sold since I got caught.
Q In other words, that was the time you were convicted; you were arrested and convicted?
A Yes, sir.
Q And you haven't sold any heroin since then?
A No, sir.
Q Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have

you tried to get heroin for them in order to sell to them?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q In other words, no one has ever come up to you and wanted to buy heroin?

A No, sir.

Q And you have never told anybody that you would try to get heroin to sell to them?

A No, sir.

Q In other words, you don't act for somebody else by not selling it yourself but somebody that you know [20] selling it to a person that you introduced him to?

A No, sir.

Q In other words, you are not an in between—

A No, sir.

Q For the sale of heroin?

A No, sir.

Q Now. you can say here today that you have not discussed the sale of heroin with anybody in the last year?

A I don't understand you, sir.

Q Have you talked to anybody about selling heroin to them during the last year?

A No, sir.

Q You are sure about that?

A I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q Well, say you bought some heroin; would you ever then sell or would somebody ask you to buy some of that heroin?

A No, sir.

Q Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A No, sir.

Q When you purchased heroin in what quantities would you buy it?

[21] On papers.

Q Would you ever purchase grams?

A Yes, sir, sometimes.

Q Would you ever purchase ounces?

A No, sir.

Q What is the most number of grams you have ever purchased at one time?

A Well, half a paper.

Q Well, but if you bought it in balloons, how much?

A One-half gram, $16.

Q Just one-half gram?

A Yes, sir.

Q When you were an addict and when you were using every day—I guess there was the time when you used every day?

A Yes, sir.

Q At that time you must have been buying every day, weren't you?

A Yes, sir.

Q Now, how many—Did you shoot more than one gram a day when you were really bad off?

A Yes, sir.

Q About how many grams?

A About two.

Q About two grams?

A Yes, sir.

[22] Q So you would have to buy heroin four times a day—

A Yes, sir.

Q —in order to satisfy your habit?

A Sometimes I buy one and a half, you know, buy a half and then go and get some more money and buy another half and then another half.

Q Did you buy that heroin over on Guadalupe Street?

A No, sir.

Q Where would you buy it?

A Up here on Poplar or anyplace.

Q Poplar?

A Yes, sir, or downtown.

Q Did you have one person you always would buy from or did you buy from several people?

A No, I would buy from anybody that sells it.

Q Now, your place is on the 2200 block of Guadalupe, right, your bar where you live?
A Where I work, yes, sir.
Q And you never buy any over there?
A No, sir. I haven't fixed, you know. I was here in town. I buy it here in town when I buy it.
Q Who were some of the people that you bought it from?
A Just anybody here selling in town.
Q I would like to know and the Grand Jury would like to know certain names.
[23] A I just, you know, from anybody that sells there, you know, Juan or another boy up there sells at that street down there.
Q But now you say you are buying something like three or four times a day?
A Yes, sir.
Q And isn't it true that if you don't get that heroin every day you will get sick? When you were shooting two grams a day—
A Yes, sir.
Q —if you didn't have any heroin that day, what would happen?
A I would be sick.
Q Is that a pleasant experience?
A No, sir.
Q Has that happened to you often?
A Yes, sir.
Q So would you buy heroin four times a day every day when you had a two-gram a day habit?
A No, sir. Sometimes I couldn't make it.
Q And then what would happen?
A I just wouldn't make it.
Q You would get sick?
A Yes, sir.
Q Or would you get one gram a day. How would you do [24] that?
A I would just try and see for how much I could get and then if I can't get no more I have to wait until another day.

Q And even though you probably did purchase heroin quite a large number of times you don't know anybody by name that sold it to you?
A Yes, sir, a couple of boys.
Q Who?
A Juan. I don't know his last name but he sells here downtown.
Q On what street?
A Where the bridge is, that way.
Q What bar does he work out of or does he work out of a bar?
A Sir?
Q What place does he hang out in?
A He stands there like in front of the movies, you know, or close to the bridge or the Alameda Theatre.
Q You don't know this man's last name?
A No, sir.
Q Do you know his nickname?
A No, sir. I don't think—I don't know. I just, you know, when everybody would buy from him I would buy from him, too.
[25] Q How much did he sell a gram for?
A 14 or $13.
Q For one gram?
A No, sir, for half, you know. I would buy a half.
Q Do you know anyone over on Guadalupe Street that sells heroin? Certainly around your—the place where you work and that area lots of people do sell heroin, don't they?
A Well, yes, sir.
Q Do you know any of them?
A No, sir. I haven't, you know, been too much, you know.
Q You can't give us any names of people who sell heroin over there?
A No, sir, because I don't know who is selling there, you know. I have been to, you know—I haven't been down lately, you know.
Q Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A No, sir.
Q No one has ever given you any money—
A No.
Q —to go buy them heroin?
A No, sir. Like, say, somebody comes for me to cut for [26] him? No, sir.
Q That doesn't happen either?
A Because they don't trust me like that, you know.
Q If you had the money would you be able to buy an ounce of heroin?
A Well, no, sir, I don't think so.
Q In other words, if you had $650 right now—
A Yes, sir.
Q —do you think you would be able to purchase one ounce of heroin?
A No, sir, I don't think so.
Q Where would you go to try and do that?
A Well, I wouldn't try to.
Q You wouldn't even try?
A No, sir.
Q Do you have a car?
A Yes, sir.
Q What kind is that?
A A '65 Pontiac.
Q That's the only car you have?
A Yes, sir.
Q Is your wife a heroin addict?
A Yes, sir. She—I mean we are both using the medicine.
Q You are both taking the medicine?
[27] A Yes, sir.
Q Do you know when the last time she has used heroin is?
A The same time I did.
Q You both stopped together?
A Yes, sir. We stopped and then sometimes we try it and sometimes, you know, we don't. I mean we have stopped for a long time now.
Q Mr. Mandujano, our information is that you can tell us more about the heroin business here in San Antonio than you have today. Is there anything you would like to add telling us more about who sells heroin?

A Well, sir, I couldn't help you because, you know, I don't get along with the guys and I just can't tell you, you know.
Q Do you have a gun by any chance?
A No, sir.
Q You don't own a gun?
A I own one, yes, sir.
Q Where is it?
A In my house.
Q What kind of gun is it?
A It is a .32.
Q When did you buy it?
A Several years ago.
[28] Q At a gun shop?
A No, sir.
Q Who did you buy it from?
A From another guy.
Q What was his name?
A Alfredo.
Q Who?
A Alfredo.
Q Alfredo who?
A Morine. I think Morine, something like that.
Q Is he from San Antonio?
A I don't know.
Q Have you seen him lately?
A No, sir.
Q Do you know where he got that gun?
A No, sir.
Q What kind of gun was it?
A A .32.
Q What kind of gun is that?
A I think it is a .32, sir.
Q A what?
A A .32.
Q A .32 Springfield or what kind of gun is that? Do you have any idea?
A No, sir. It has a little lion.

[29] Q You bought it here in San Antonio?
A Yes, sir.
Q How much did you pay for it?
A $25 I think, $23 or $25, something like that.
MR. LUCKEL: I have no further questions. Would someone like to ask a question?
MEMBER OF THE GRAND JURY: Have you filed an income tax return this year yet?
THE WITNESS: No, sir.
MEMBER OF THE GRAND JURY: Did you do one last year?
THE WITNESS: No, sir. A what, sir?
MEMBER OF THE GRAND JURY: Income tax.
THE WITNESS: No, sir.

QUESTIONS BY MR. JOHNSON:

Q Is this .32 gun, is this a pistol?
A Yes, sir, automatic, small gun. I have it in my house.
Q You had two in your house?
A No, sir. I have it in my house.
Q Where do you keep it in your house?
A I keep it high enough.
Q In the clothes closet?
A Yes, sir, because the police went into my house one [30] day and he told me, you know, I have to keep it high and not to carry it in the car, you know, just to keep it in the house, you know, and I put it high enough, you know.
MR. LUCKEL: Mr. Mandujano, thank you very much for testifying today. You will be excused now.

(End of Proceedings.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Criminal Action No. SA-73-CR-163

[Received in U.S. Clerk's Office July 23, 1973, Western District of Texas, San Antonio Division]

UNITED STATES OF AMERICA

vs.

ROY MANDUJANO

MOTION FOR SUPPRESSION
OF TESTIMONY BEFORE GRAND JURY
AND
MEMORANDUM BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ROY MANDUJANO, Defendant in the above entitled and numbered cause and respectfully moves this Honorable Court for an order suppressing for use as evidence the testimony given by the said Defendant before the Special Grand Jury, which convened on or about May 2nd, 1973 for the following reasons to wit:

I.

That at the time of Defendant's appearance and testimony before the Special Grand Jury, Defendant's appearance and testimony was in response to a subpoena served on him.

That Defendant, Roy Mandujano was at the time of his appearance before the aforesaid Grand Jury, a probable or putative Defendant by virtue of prior investigations by various Law enforcement agencies, defendant having been investigated by narcotics undercover agents during the latter part of March, 1973, and prior to his appearance on May 2, 1973, before the Special Grand

Jury. This investigation of Defendant by undercover narcotics agents is the basis for count one of this indictment against Defendant. He was thus entitled to the warnings and requirements as required by *Miranda* v. *Arizona*, 384 U.S. 436, 16 S. Ct. 1602, 16 L. ed. 2d (1966), cited in *U.S.* v. *McGinnis*, 344 F. Supp. 89 (1972) (D.C., S.P. Texas).

II.

Referring to "A person who is virtually in the position of a Defendant", which was treated by *U.S.* v. *Fruchtman*, 232 F. Supp. 534 (1968), the Ohio District Court, N.D., Ohio, W.D., the Court pointed out "that although the government may not be seeking and indictment against a witness at the time he takes the stand, there may come a point in the proceedings when the situation changes to such an extent that the witness becomes virtually . . . . a defendant." In this cause, Roy Mandujano was in a position of a Defendant, from the moment he entered the Special Grand Jury Room and throughout the whole of the aforementioned Grand Jury proceedings. In *U.S.* v. *Luxenberg*, 374 F. 2d 241 (1967), the Sixth Circuit Court stated:

"This Court has held that a person who is virtually in the position of a Defendant must be accorded the same rights as a Defendant." As per *U.S.* v. *Luxenberg*, Supra, the rights due Roy Mandujano were the minimum warnings of his Constitutional rights to:

A. Refuse to answer questions tending to incriminate him.
B. That anything he says will be used against him.
C. That he could, during anytime in the proceedings, refuse to answer any questions tending to incriminate him, and request legal counsel.

III.

Further, Defendant submits that his subpoena for purposes of testifying as a witness was to extract perjurious testimony as evidenced by the allegations contained in

count one of the Indictment, specifying an alleged transaction taking place on or about the 29th day of March 1973, which, taken in the light of count two of the Indictment, shows no further requisite action for purposes of filing charges.

WHEREFORE, PREMISES CONSIDERED DEFENDANT herein prays that, upon a hearing, this Honorable Court enter is Order, suppressing all testimony of Defendant, given before the Special Grand Jury on May 2, 1973, and holding said testimony cannot be used as evidence against this Defendant in either count of this or any other Indictment.

Respectfully Submitted,

RUBEN SANDOVAL
500 N. Main
San Antonio, Texas
78205

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA 73 CR 163

UNITED STATES OF AMERICA

v.

ROY MANDUJANO

ANSWERS TO DEFENDANT'S PRETRIAL MOTION

Comes now the United States of America by and through the United States Attorney and in answer to defendant's motion to sever, to dismiss count one and to suppress testimony given by defendant before the special grand jury, says that these motions are without merit and should be denied for the reasons hereinafter assigned.

I.

Severance

Rule 8(a) of the Federal Rules of Criminal Procedure permits joinder of offenses against a single defendant if any one of three tests is satisfied. *First*, they may be joined if they are based on the "same act or transaction." An essentially pragmatic construction based on precedents from civil procedure, has been applied in determining what is meant by "transaction." Under this rule permitting joinder of two or more offenses, if indictment is based on same transaction, an interpretation of the word "transaction" frequently involves the balancing of conflicting interest, speed, efficiency, and convenience in function of federal judicial machinery against right of accused to a fair trial, without any substantial prejudice to that right occasioned by joinder of offenses. *Second*, offenses may be joined if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." These two grounds for joinder have caused little difficulty or controversy. The desirability of joinder of offenses arising out of the same or related acts is apparent.

Finally, Rule 8(a) permits joinder of offenses if they are "of the same or similar character." Here naturally there are obvious dangers of prejudice to the defendant.

The Government would substantially base its position on test number 2, that being that the two acts are connected together and constitute a common scheme. Certainly the proof as to the false statement charge will require proof involving the initial violation alleged in count one of the indictment. Government submits that the two alleged acts are connected together, in that they basically involved the one transaction, an attempt to distribute a narcotic controlled substance in violation of law.

Rule 8(a) allows free joinder of offenses charged against a single defendant and motions for relief from prejudicial joinder being authorized by Rule 14 of the Federal Rules of Criminal Procedure are addressed to the sound discretion of the trial court. *United States* v. *Lane*, 465 F.2d 408 (5 CA 1972) and *United States* v. *Abshire*, 471 F.2d 116 (1972). The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed by a reviewing court. The defendant must show something more than the possibility that a separate trial might have offered him a better chance of acquittal. See *Spencer* v. *Texas*, 385 U.S. 554 (1967).

In the case at bar, both offenses rose out of the same sequence of events so that the government would submit that joinder would be proper under Rule 8(a).

II.

Dismissal

Count one of the indictment alleges a violation of Title 21, United States Code, Section 846 (attempt and conspiracy). That provision of law provides that "any person who attempts or conspires to commit any offense

defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The defendant in his brief states that the Government must prove beyond a reasonable doubt that any substance the defendant is alleged to have represented as heroin was in fact heroin and cites case law in support of his point. The Government submits that it is not necessary in the case of a conspiracy or attempt, to prove that there was actually a substance involved. Cases cited by defendant all involve actual sale of narcotic substances, that is the actual transfer of the substance alleged to be narcotic and it was necessary in those cases for the Government to prove beyond a reasonable doubt that the quantity of narcotics on the date alleged in those indictments was in fact a narcotic substance.

It is *obvious* by reading the statute that the same requirements as to conspiracy were to be considered in the crime of attempt in that they are joined together in Title 21, United States Code, Section 846. Defendant has attempted to make the crime of attempt synonomous with the crimes of importation, distribution and transportation of narcotics. Obviously the Congress considered it to the contrary and analogous to the crime of conspiracy.

Sections 406 (21 USC 846) and 1013 (21 USC 961) of the Controlled Substances Act of 1970 added the crimes of attempt and conspiracy to the list of substantive offenses which are prescribed by that Act. Section 406 refers to attempts to commit crimes defined by Title II of the Act which are, generally, the manufacturing, distributing, possessing, and similar offenses. Section 1013 treats attempts to commit offenses which involve Title III of the Act, the import and export of controlled substances. Federal law has long differentiated between the commission of the substantive offense and the attempt to commit the offense. The general rule is that if an attempt is not defined by the statute it cannot itself be punished. Thus the Supreme Court in *Keck* v. *United States*, 172 U.S. 434 (1899), held in a smuggling prosecution that

> Whilst it (18 USC 545) embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same . . . It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks plain distinction between the attempt to commit an offense and its actual commission. Id. at 444.

The present Act, of course, avoids this difficulty; it does contain what may be called a "general" attempt statute at least insofar as offenses under the Controlled Substances Act are concerned.

It has been said that criminal attempt "is more intricate and difficult of comprehension than any other branch of the criminal law." *Hicks* v. *Commonwealth*, 86 VA 223, 9 S.E. 1024, 1025 (1889). Attempt has been a part of the criminal law for a long time, but time alone has not been successful in resolving all of the problems which attempt creates. The first problem, then, is definitional: at what point does mere preparation cease to be an innocent act and become criminal. The Controlled Substances Act, like any other federal statute which speaks of attempt, does not define the term, and the courts will presumably have to rely upon the common law, such as it is, to provide such a definition.

As to the question of what constitutes the elements of attempt, the Government would submit that to constitute an indicable attemp there must be a specific intent to commit a particular crime; a perpetrating act done in pursuance of such intent, but which falls short of actual commission of the crime and that further there must be at least *apparent ability* to commit the intended crime and the intended crime must be legally possible of commission.

Mr. Justice Holmes made the following statement with respect to the elements of this offense:

> Preparation is not an attempt but some preparation may amount to an attempt. *It is a question of degree.* If the preparation comes very near to the accomplishment of the act, then intent to complete it renders the crime so probable that the acts will be a misdemeanor, although there is still a locus poenitentiae (opportunity to change one's mind), in the need of a further exertion of the will to complete the crime.

In *United States* v. *Coplon*, 185 F.2d 629 (2 CA 1950), cert. denied 342 U.S. 920, the able justice Judge Learned Hand said:

> A neat doctrine by which the test when a person, intending to commit a crime which he fails to carry out, has 'attempted' to commit it would be that he has done all that is within his power to do, but has been prevented by intervention from outside; in short, that he has passed beyond any locus poenitentiae. Apparently that was the original notion, and may still be the law in England; but it is certainly not now generally the law in the United States, for there are many decisions which held that the accused has 'passed beyond' preparation, although he has been interrupted before he has taken the last of his intended steps. The decisions are too numerous to cite, and would not help much anyway for there is, and obviously can be, no definite line. . . . We have found scarcely any decisions of federal courts, but so far as they go, they are in accord.

There is also a recent Fifth Circuit case in point, *Mims* v. *United States*, 375 F.2d 135 (5 CA 1967). The court in that case stated as follows:

> Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins, but the test adopted in the various jurisdictions fall somewhere between the two extremes represented respectively by the old common law guide and one suggested by the model penal code of the American Law Institute. The question has not been decided by this court; but, in the event of another trial help can be obtained from the few federal cases on it.

The common law test is discussed in the *Coplon* case, supra, and the ALI model penal code is reviewed in the Butler case, *United States* v. *Butler*, 204 F. Supp. 339 (S.D. N.Y. 1962), wherein the court said:

> As defined by the model penal code, the crime is essentially 'one of criminal purpose implemented by an overt act strongly corroborative of such purpose.'

The court further went on to say:

> Thus the question involved in distinguishing preparation from attempt is whether the actor's conduct is sufficiently unequivocal to be corroborative of the actor's purpose. Were that the question before me, I would have little difficulty in holding that the defendant attempted to purchase narcotic drugs. He telephoned twice to discuss the purchase, he arranged for delivery to occur at a designated place in time, he arrived at that place at that time, and he identified himself to the agent by the name used in the telephone conversations.

In looking for a good general definition of attempt it may be helpful to see W. Mathis and E. Devitt, Federal Jury Practice and Instructions, Section 13.14, 1965, and E. Devitt and C. Blackmon, Federal Jury Practice and Instructions, Section 16.16, 1970.

In section 13.14 as follows

> To attempt an offense means wilfully to do some act, in an effort to bring about or accomplish something the law forbids to be done. An act is done wilfully, it is done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Section 16.16 states exactly the same jury instruction.

Naturally discussing attempt involves the proverbial "lawyer joy" of the mixed question of fact and law and the Government would submit that only a review of the

evidence would enable this Honorable Court to consider whether an attempt actually was consummated. The Government submits that the defendant did have the intent and that further it would show that there was an overt action which constituted a criminal attempt. The Government would further show that the overt action need not itself be illicit or forbidden. Indeed the defendant's conduct may be entirely lawful; however, such conduct becomes punishable when committed in perpetration of the criminal intent. These facts can be shown at time of hearing from testimony elicited from agents of the Drug Enforcement Administration.

The general view today is that the material factor test applies, this being applied when the accused's conduct has gone beyond mere preparation and consists of acts which in ordinary experience would be a material factor in bringing about the type of crime involved. Acts of preparation are equivocal. They may or may not reflect a criminal intent. Where, however, the accused has committed an act which would directly tend to accomplish the crime (a material factor), his conduct is no longer equivocal and criminal sanction should be imposed. The Government would submit that the same standards as used in the conspiracy should be used in an attempt and that once the criminal intent is coupled with any overt act in furtherance of that criminal intent, that would constitute the crime of attempt.

III.

Suppression of Testimony

The general rule is that a grand jury witness is not entitled to be warned of his right to counsel and his right to remain silent. *United States* v. *DiMichele*, 375 F.2d 959 (3 CA 1967). In that case the defendant was convicted of perjury for a statement made before a grand jury concerning illegal gambling activities. His appearance before the grand jury was a result of a subpoena served on him by F.B.I. agents, at the time he was arrested for participating in a gambling session. When

he appeared before the grand jury, he was questioned about the events which led to his arrest. Even though the defendant witness had been arrested (and was therefore in custody) he received no warning at the time he appeared before the grand jury some two weeks later. All Circuits with the exception of the Sixth follow this rule. The Sixth Circuit recognizes that when a man ceases to be merely a witness in a general investigation but has been placed virtually in a position of a defendant he must be afforded virtually in a position of a defendant he must be afforded the full panoply of rights due a defendant in custody.

Though the Fifth Circuit has recently addressed the question of the scope of *Miranda* in the context of grand jury investigations, Matter of *Carson*, 424 F.2d 202 (5 CA 1971), it has yet to deviate from the general rule as expressed in *DiMichele*, supra. In *United States* v. *Morado*, 454 F.2d 1967 (1972), the Fifth Circuit recognized the existence of the Sixth Circuit rule but declined to face it squarely since the investigation in that case had not passed the stage of "being a general inquiry into an unsolved crime and had not focused upon the defendant as a person whom the Government planned to indict." The key in the *Morado* case appears to be whether or not the focus of the investigation is centered upon the witness who appeared before the grand jury. From the aforementioned review of the Sixth Circuit this appears to be an overstatement of the virtual defendant test.

In another recent Fifth Circuit case, *United States* v. *Daniels*, 461 F.2d 1076 (1972) which has relevance here the court held that there is no requirement that the Government advise the witnesses before the grand jury that counsel will be appointed for them free of cost in the event they are indigent. The witness had been advised of the self-incrimination waiver which he had signed and that an attorney outside the grand jury room would be permitted, but had not been advised that counsel would be appointed if he did not have the means to employ one himself. The court noted that he was not under indictment, but merely a witness.

In conclusion, under the general rule as followed by all the circuits with the exception of the Sixth the

defendant was not entitled to any warning rights whatsoever. The defendant had not become a virtual defendant as has been defined by the Sixth Circuit. He had not been arrested nor indicted nor had plans been made to present an indictment to the grand jury against him when he testified. He was merely called upon to provide information to the grand jury concerning various violations of criminal law committed in the Western District of Texas and while being questioned accordingly made false statements to the grand jury.

While it is the Government's contention that under the virtual defendant rule of the Sixth Circuit or the general rule pertaining in all other circuits the witness was not entitled to a warning. It should be noted that the defendant was given a warning by Government attorneys simliar to a full *Miranda* warning that included right to refuse to answer questions which tend to be incriminating and the right to have counsel present outside the grand jury room to consult if the need arose. The case of *United States* v. *Wilcox*, 450 F.2d 1131, 1140 (5 CA 1971) has held that even though a witness had not voluntarily waived his Fifth Amendment rights he could not thereafter commit perjury with impunity. The Government submits that this case stands for the principle which is despositive of this case before this court.

IV.

Conclusion

Wherefore premises considered, the Government would move the court to overrule defendant's motions.

Respectfully submitted,

WILLIAM S. SESSIONS
United States Attorney

By /s/ John M. Pinckney, III
John M. Pinckney, III
Assistant U.S. Attorney

[Certificate of service omitted in printing]

EXCERPTS FROM THE TRANSCRIPT OF THE AUGUST 24, 1973, PRE-TRIAL HEARING

[35] MR. PINCKNEY: That is correct. He was not a defendant at the time, no indictment, and we go back to what we are talking about a while ago with conspiracy, and I have talked to Mr. Alexander about this. I am not making a self-serving statement on behalf of the government, but there might very well, looking at the indictment on its face without evidence behind it, it might look like this was a real setup job. Here is an allegation of an offense occurring in December and the individual was called before the grand jury and asked questions, and the government submits that he ended up perjuring himself as to the transactions back in December. So, it does, on its face, look like the omnibus arm of the government kind of taking advantage of the individual where, in fact, the government would submit that in this case the original transaction occurred—Here you get into the bureaucracy of the Federal Government, the B.N.D.D., Bureau of Narcotics and Dangerous Drugs, then you have the Office of Drug Abuse Law Enforcement, another arm of the Justice Department in the Executive Branch, proceeding with the grand jury, having available to them some intelligence from B.N.D.D. as to this individual's heroin trafficking in San Antonio. The government will submit that at that point, after it was clear that the government thought that there was a [36] violaion of the perjury statute or the false representation before the grand jury, Mr. Luckel brought this case to the United States Attorney's Office and it was then and only then that I said, "You have a case of perjury, but there is also possibly a violation of the attempt statute back in December." It was only then that the two were consolidated and presented to the grand jury, and an indictment was returned.

I would be leery in the future, with the background I have had in this case, with the knowledge that I now have, to bring someone before a grand jury and then later indict him in this situation, but it did not bother me because I knew the facts. In other words, it was not

the omnibus arm of the government setting someone up in both of these cases, this being the first two attempts that have been brought in this court out of the United States Attorney's Office. I went around to everyone. No knowledge as to attempt. So,—

* * * *

[DIRECT EXAMINATION OF EB LUCKEL]

[56] Q And is it your position now that after he testified before the grand jury and committed, in your opinion, a perjury, that you then reviewed the facts and were able to present the indictment to the next grand jury that met in June?

A That is not quite correct. I had planned to proceed on the false statement before a grand jury indictment. I had drawn up the indictment with that charge only in mind. I, of course, talked this over with some people in my office, and as I was doing it I encountered several problems with respect to Mr. Mandujano. I felt that there might possibly be three counts of perjury in the indictment drawn up against Mr. Mandujano, and not being able to resolve that myself, I ultimately called up Jerry Handy, the Chief of the Criminal Division, who is the person that we go through in preparing all of our cases, and consulted him on the matter of whether I should draw up this false statement indictment in one count or three counts. I reviewed the facts to him of these what I thought might be three counts of false statements, and he suggested to me that we might [57] have an attempt case in violation of Title 21, U.S. Code 846. At that time I began to give further consideration to that in not only Mr. Mandujano's case, but Mr. Rangel's case as well. It was subsequent to that time that I determined to present an indictment charging Mr. Rangel and Mr. Mandujano with attempt in addition to the false statement charge.

EXCERPTS FROM THE TRANSCRIPT OF THE AUGUST 28, 1973, PRE-TRIAL HEARING

[8] EB LUCKEL, called as a witness in behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Would you state your name and occupation, please?

A My name is Eb Luckel, and I as a special attorney employed by the Department of Justice, assigned to the D.E.A. Task Force here in San Antonio. It was formerly the Office for Drug Abuse Law Enforcement.

Q How long have you been in that capacity?

A A little over a year.

Q Briefly, could you describe what you do?

A I am responsible with several other attorneys for conducting the special federal grand jury empaneled in the Western District of Texas, San Antonio and Austin Divisions. In addition, I serve as legal advisor to the agents and officers assigned to the D.E.A. Task Force. That would mean I would advise them in any legal matters that come up in their operations as law enforcement officers, and finally I handle all legal matters through indictment, at which time it is turned over to the United States Attorney's Office.

[9] Q You handle all legal matters to indictment?

A Up through.

Q Up to?

A Through indictment.

Q Were you acting in this capacity on or about May 2nd, 1973?

A Yes, sir, I was.

Q Do you remember having occasion to have met a Mr. Roy Mandujano?

A Yes, sir, he was a witness before the grand jury on May 2nd or 3rd, 1973.

Q Had you ever seen Mr. Mandujano before?

A No, I hadn't.

Q Did you know of him?

A I knew of him, yes, I did; perhaps two weeks prior to Mr. Mandujano's appearance, I received his name as a prospective grand jury witness. I might have heard his name prior to that at the time Officer Cavalier was involved in the case that he attempted to make against Mr. Mandujano. When that was, I am not sure.

Q Did you ever have occasion to talk to Mr. Cavalier about Mr. Mandujano?

A Yes, sir.

Q Did you ever see any written reports?

A Excuse me. I had occasion to talk to Officer Cavalier concerning Mr. Mandujano and in relation to his possible [10] appearance before the grand jury.

Q Approximately how long before his appearance before the grand jury did you talk to Mr. Cavalier?

A Approximately two weeks.

Q At that time did you discuss the transaction between Mr. Mandujano and Mr. Cavalier?

A Yes, sir.

Q Did you happen to see a report on this transaction by any chance?

A I believe I did.

Q You saw a report?

A I did see a report if there was one available. I think there was one available. Now, just to make it clear, we are talking about the transaction that Officer Cavalier had with Mr. Mandujano a month or so prior to May of this year.

Q You are talking of on or about possibly March 29th of '73?

A I would assume that was in that general time area.

Q You also say that you had occasion to look at a written report in reference to that same transaction, that is, the one of March 29th of '73?

A No, I can't say that definitely. I would have looked at the written report if there had been one available, and I assume there was one written by Officer Cavalier after he had these negotiations with Mr. Mandujano. If there was one available at that time, I did see it.

[11] Q But you don't remember specifically?

A No, I recall the facts involved in that transaction, though. He did relate those facts to me.

Q Is it correct to say that Mr. Mandujano was subpoenaed based upon your conversation with Agent Cavalier?

THE COURT: That what?

Q Subpoenaed based on your conversation with Agent Cavalier.

A That is correct.

MR. SANDOVAL: Your Honor, may I approach?

THE COURT: Sure.

Q Let me ask you, Mr. Luckel, have you ever seen that report before?

A I am almost certain that I have.

Q Did you ever have occasion to go over it with Agent Cavalier?

A I don't think so. It shows here, I believe, that the report was made on June 4th, 1973, which would be subsequent to the date of the grand jury.

MR. SANDOVAL: For the record, I am going to ask that this report be identified and referred to as Defendant's, Mandujano's Exhibit A. Your Honor, I have got some writing on it. I wonder if we could have a copy—

THE COURT: Okay. Well, why don't you just identify that.

A Now, Mr. Sandoval, I can't recall the date that the indictment was presented to the grand jury. I believe it [12] was June 13th.

MR. PINCKNEY: I have on my file copy, your Honor, June 14th, as the date the indictment was returned.

MR. SANDOVAL: I have on my file, June 13th.

THE COURT: What does the Clerk's file reflect?

MRS. MUNFORD: June 13th.

THE COURT: June 13th. All right.

Q (Mr. Sandoval continuing): But you don't recall whether you ever actually saw Defendant's Exhibit 1?

A Well, I certainly did see it, because when I prepared the indictment, I would have at the same time compiled the original of this document along with whatever other

documents would be in Mandujano's file, and would take those to the United States Attorney's Office.

Q Let me ask you, did you have occasion to go through it briefly and know what it contained?

A Yes, I was well aware of all the facts contained in this report. Whether I read it or not, I am not absolutely positive.

Q Were they the similar facts that were related to you by Agent Cavalier two weeks prior to Mr. Mandujano's appearance before the grand jury?

A Yes, sir, that is correct.

Q Then, at the time Mr. Mandujano appeared before the grand jury, you knew about the prior alleged attempt to buy; is [13] this correct?

A That is correct.

Q Do you recall how many witnesses appeared that day, that is, May 2nd, 1973, besides Mr. Mandujano?

A I don't recall the exact number. My guess would be approximately eight.

Q Let me ask you, Mr. Luckel, do you recall having any conversation with Mr. Mandujano prior to his appearance before the grand jury on May 2nd, 1973?

A No, I don't.

Q You don't recall whether you asked him whether he wanted an attorney or not?

A No. Now, that was when he appeared before the grand jury on May 2nd; after he had been sworn in, I began to relate to him certain rights and those included the question—I advised him that he had the right to have an attorney. Now, that was not prior to the grand jury session. That was when he was sworn in as a witness.

Q You advised him that he had the right to an attorney?

A Yes, sir.

Q Do you remember what his response was?

A Well, it would appear in the grand jury transcript. I cannot remember what his response was.

Q This is a copy of the transcript. Would you read lines 11 through 21, please.

[14] THE COURT: You want him to read that out loud?

MR. SANDOVAL: Yes, your Honor.

A "Have you contacted a lawyer in this matter?" Answer: "No, sir, I haven't." Question: "I take that to mean that you do not wish the services of a lawyer here today?" Answer: "I don't have one. I don't have the money to get one." Question: "Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to you, let me know." Answer: "Yes, sir." Question: "Is that clear?"

Q In other words, Mr. Mandujano never really said that he didn't want a lawyer, did he?

A He never said that, "I do not want a lawyer," no.

Q He stated to you that he could not afford one; is this correct?

A He said that—well, he said—If you could give me a copy of that, I might be able to recall. I can relate what he said if that is what the transcript said.

MR. SANDOVAL: Shall we go ahead and mark this as Defendant's Exhibit 2?

MRS. MUNFORD: Marked Defendant's Exhibit B.

A He said that he didn't have one and that he didn't have [15] the money to get one.

Q Do you recall whether you advised him that if he couldn't afford one, that the Court would appoint one for him?

A I did not advise him as to that fact.

Q Do you recall the reason for it; was it an oversight on your part?

A No, it was not an oversight. My purpose in providing this particular aspect of the warning, along with other things that I have not yet read, was to go well beyond the requirements for warnings given to a grand jury witness when they appear before a grand jury, and that was my purpose in giving any warnings, and the

warnings that I did give, I feel, amply satisfies the requirements set forth under the law.

Q Mr. Luckel, at the time Mr. Mandujano appeared before the grand jury on May 2nd, 1973, you stated you knew about a possible transaction that never occurred between Mr. Mandujano and Mr. Cavalier; is this correct?

A That is correct.

Q Did you have any idea at the time, that is, on May 2nd, 1973, whether or not Mr. Mandujano might be indicted as a consequence of that action?

A I had no idea that he would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the [16] negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano.

Q Let me ask you this, Mr. Luckel, at the time that Mr. Mandujano appeared before the grand jury, did you know then that he was going to be asked any questions in reference to his transaction or alleged transaction with Mr. Cavalier?

A Yes, sir, I did.

Q You knew about it, then?

A If you would like me to explain that, Mr. Sandoval, I will. It might clarify matters.

Q Well, let me ask you a few more questions, and then I will be through. Let me ask you, do you recall whether, during his testimony, Mr. Mandujano made any admissions of any prior offenses or anything like that?

A I don't recall. He may have. He may not have. I would have to refer to the transcript for that.

Q Would you look at page 13, please.

A Pardon?

Q Page 13 of the transcript, would you start from number and read down to number 22?

A Question: "How many times have you been convicted?" Answer: "One time." Question: "That is for shoplifting?" Answer: "No, sir, for burglary and for shoplifting and for drugs." Question: "So, one time for each. You have [17] been convicted for burglary?" Answer: "No, sir, twice. I mean one time for burglary and one time for drugs." Question: "And one time for

drugs?" Answer: "Yes, sir." Question: "When was the drug offense?" Answer: "About ten or fifteen years ago." Question: "Ten or fifteen years ago. How old are you, sir?" Answer: "Thirty-three." Question: "What drug was it, ten or fifteen years ago?" Answer: "Heroin."

Q Let me ask you, Mr. Luckel, at the time, did you know anything about Mr. Mandujano's past, that is, his criminal record?

A I can't say that definitely, although when we subpoena these witnesses we have a certain amount of existing intelligence and one document that we would frequently have would be a rap sheet, which would appear—which I imagine these convictions would appear on his rap sheet. Whether I had that or not, I really can't say, although we do have a considerable body of knowledge on witnesses when they do appear to testify.

Q I am asking you whether you knew of it yourself, not necessarily whether you had the records before you on that; did you know of those prior convictions?

A I can't say. My guess would be perhaps that I did, or I had information that he did have a record, or he had prior convictions, not knowing specifically what they were. [18] I really can't say definitely.

Q Would you please turn to page 19. Would you read from number 10 through number 1 on the next page, rather, number 2.

A Question: "And you haven't sold any heroin since then?" Answer: "No, sir." Question: "Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?" Answer: "No, sir." Question: "Are you sure of that?" Answer: "Yes, sir." "Question: "In other words, no one has ever come up to you and wanted to buy heroin?" Answer: "No, sir." Question: "And you have never told anybody that you would try to get heroin to sell to them?" Answer: "No, sir." Question: "In other words, you don't act for somebody else by not selling it yourself, but somebody that you know selling it to a person that you introduced him to?" Answer: "No, sir."

Q Would it be safe to assume that that questioning was based on your conversations that you had with Mr. Cavalier prior to Mr. Mandujano's appearance before the grand jury?

A That is correct.

MR. SANDOVAL: I have no other questions. Thank you.

THE COURT: All right, Mr. Pinckney.

CROSS-EXAMINATION

[19] Questions by Mr. Pinckney:

Q Mr. Luckel, in your legal opinion, at the time you were having Mr. Mandujano subpoenaed to appear before the DALE grand jury, did the transaction, the prior transaction between Mr. Mandujano and Officer Cavalier, the report for which you have indicated you had knowledge of, did at that time, in your opinion, did that transaction constitute an indictable offense?

A No, sir, it did not.

MR. SANDOVAL: Your Honor, before he answers, I want to object to that. He has already stated he didn't know whether he was—

THE COURT: I couldn't hear you. You held your hand over your mouth.

MR. SANDOVAL: We object, your Honor. I think he has already stated before that, at the time, that he didn't know this was or was not going to be an indictment returned.

MR. PINCKNEY: That is not the question.

THE COURT: Now, wait a minute. I don't recall him testifying to that. I overrule the objection.

MR. PINCKNEY: All right.

Q Now, as to your prior knowledge as to the transaction and your asking questions as to the prior dealing—Well, let me go back. Strike that, please, sir. If, in your legal [20] opinion, it did not constitute an indictable offense, what was the reason that you obtained the appearance of defendant Mandujano by subpoena before the grand jury?

A Officer Cavalier, when he was relating the transaction that he had with Mr. Mandujano, indicated there was a person who delivered heroin to Mr. Mandujano daily. I believe it was at a certain lounge that Mr. Mandujano either owns, has an interest in, or manages. He also indicated that when—this is Officer Cavalier when he was discussing the possible purchase of heroin with Mr. Mandujano—Mr. Mandujano made certain attemps to contact people in order to purchase or in order to get the heroin for Officer Cavalier. Officer Cavalier saw him place several calls, and Mr. Mandujano stated to Officer Cavalier that he would try to get such and such a source to provide the heroin, on and on like that. Now, we wanted to get the details of this activity. In other words, who these sources for Mr. Mandujano are and whatever details the grand jury could determine of the actions of these potential sources, potential, clearly potential, inasmuch as they came from statements given by Mr. Mandujano and activity by him.

Q All right, sir. Now, on your direct testimony, in response to Attorney Sandoval's questioning as to your prior knowledge of this event and your asking questions as to this prior [21] dealing with Officer Cavalier by defendant Mandujano, is that a standard procedure that you use in interrogating witnesses before a grand jury—to have prior knowledge to inquire about?

A I don't believe we subpoenaed any witness that we didn't have an existing body of knowledge about, and in virtually every case we would ask questions about facts that we did have. That was, number one, a method to gauge the truthfulness of the person's testimony, and, number two, it was in the nature of a natural progression to result in answers to the ultimate questions. A simple example of that might be if a person is a heroin addict, he obviously has to have a source of supply, and you would say, "Are you an addict?" and his answer might be, "Yes." The natural question to follow that would be, "Who do you purchase heroin from?" or, "Where do you get your heroin?" Now, you would not ask him, "Who do you purchase your heroin from?" without first having asked him, "Are you an addict?"

to establish that fact, and, basically, what his habit might be, things like that. In the case of Mr. Mandujano we had information which led me to believe that he was being supplied heroin by one person regularly and possibly several other persons, and before I could determine whether—who these people were, the circumstances of the deliveries and whatever, I had to go through the step of [22] determining whether he ever offered to get heroin for anybody or to sell heroin. I am sure I asked him if he ever used heroin, and I am sure later I asked him if he ever sold heroin.

MR. PINCKNEY: I have no further questions, your Honor.

THE COURT: Do you have any further questions?

MR. SANDOVAL: I have a few.

REDIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Mr. Luckel, you stated on cross-examination by Mr. Pinckney that you had a rather lengthy conversation with Agent Cavalier about transactions and phone calls and so forth made by Mr. Mandujano; isn't that correct?

A That is correct.

Q Then, would you not say that in your opinion as an attorney that Mr. Mandujano might have subjected himself to at least a possible charge of conspiracy based on the conversation with Agent Cavalier?

A A conspiracy with Agent Cavalier as a co-conspirator?

Q Expressly, to possess and/or possibly distribute drugs, based on the conversation you had as to amounts, phone calls, and so forth; based on your legal opinion, would it not be correct to say that perhaps he exposed himself to the charge of conspiracy?

[23] A I would say definitely not. Now, any conspiracy case that might have been present would not have involved Agent Cavalier, and any overt acts would have had to have been involving Mr. Mandujano and one of these sources. I can see a slight potential there for a

possible conspiracy case based around that, but not—a slight—well, I don't want to be held to that now. No, it didn't cross my mind.

Q A slight potential as far as Mr. Mandujano was concerned, was it not?

A No.

MR. SANDOVAL: No more questions.

THE COURT: All right. Any further questions?

MR. PINCKNEY: No, sir.

THE COURT: All right.

MR. SANDOVAL: Call Mr. Cavalier, please.

MR. PINCKNEY: Your Honor, may Mr. Luckel stay with me at this point?

THE COURT: Yes, sir.

ALFONSO CAVALIER, called as a witness in behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Sandoval:

Q Would you state your name and occupation for the record, please?

A My name is Alfonso Cavalier. I work for the San Antonio [24] Police Department, currently assigned to the Office of Drug Abuse Law Enforcement, which is now the Drug Enforcement Administration Task Force.

Q How long have you served in that capacity?

A Since May, '72.

Q Would you describe briefly what your job encompasses?

A Working on the narcotic traffic here in San Antonio by using undercover buys, surveillance, utilizing the grand jury.

Q I see. Were you working in that capacity on March 29th, 1973?

A That is correct, sir.

Q Do you recall whether you had an occasion to go to 2217 Guadalupe Street?

A That is correct.

Q Would you please state what prompted you to go there?

A I received information that the subject, who allegedly owns the Tally Ho Lounge at that location, was dealing in narcotics, that I could possibly make a buy from this subject.

Q Do you recall the name of that person?

A Roy Mandujano.

Q Did you know Mr. Mandujano prior to that occasion?

A No, sir.

Q Did you know of him?

[25] A Yes, sir.

Q Do you remember what time you got there, that is, at 2217 Guadalupe Street?

A Approximately 1:30 in the afternoon.

Q You got there approximately 1:30?

A Yes, sir.

Q Do you remember how long you stayed there?

A Several hours, until approximately 4:30.

Q Do you remember whether—were you by yourself, or were you with someone?

A I had a confidential informant with me, yes, sir.

Q Were you able to talk to Mr. Mandujano?

A Yes, sir, I was.

Q Do you recall whether at that time you had anything to drink?

A Yes, sir, I did.

Q You did. Do you remember what it was?

A I had two beers and a wine cooler.

Q Two beers and one wine cooler during all this period of time?

A I am sorry?

Q During all this period of time, between 1:30 and 4:30, you had two beers and one wine cooler?

A That is correct.

Q Did anybody else do any drinking?

A The informant had a beer, and I believe Mr. Mandujano had [26] a beer.

Q Was Mr. Mandujano present all the time that you were there?

A Not the total time, no, sir.

Q Would you state what you mean by "not the total time"?

A He was in my company until about 3:25, at which time he allegedly went to score me some narcotics.

Q At the time he went to score some narcotics for you, you say,—

A Yes, sir.

Q —how long was he gone; do you know?

A Approximately forty-five minutes to an hour.

Q Did you offer any money to him at that time when he left?

A We had discussed me purchasing an ounce of heroin from him. He was unable to make any contacts while I was there.

Q At the time he left did you offer him any money?

A He asked for money. He said he needed my money to score the ounce of narcotics.

Q Did you give him any money?

A Yes, sir, I did. I gave him $650.00.

Q How long was he gone, do you say?

A Approximately forty-five minutes to an hour.

Q What happened after he got back; do you recall?

A Yes, sir. He told me that he could score the ounce for me, but it would be a little later in the evening when his regular connection made his stop there, that I was to [27] call and call him telephonically, call him back by telephone, and make arrangements to pick it up later.

Q Did he give you back the money?

A Yes, sir, he did.

Q Did you ever have occasion to talk to him again after that?

A No, sir. I attempted to. He was not at the location or not at the Tally Ho.

Q Do you recall during the time that he was with you at 2217 Guadalupe Street, did he make any phone calls?

A Yes, sir, he made several phone calls.

Q Do you remember what the subject matter of any of those phone calls was?

A He was attempting to score narcotics for me.

Q Did you hear him say that?

A I heard one conversation where he spoke to one party, where he said he wanted to make a score, but he was out, and that the party said the party he was looking for wasn't home. They said that they would contact the party and tell them to get in touch with him as soon as they got back.

Q Did you have occasion to make a report?

A Yes, sir.

Q How many reports—do you remember how many you made?

A How many reports?

[28] Q Since March 29th, '73, how many reports have you made on this incident?

A One, sir.

Q One.

MR. SANDOVAL: May I approach the witness, your Honor?

THE COURT: All right.

Q Do you recognize that?

A Yes, sir.

Q Would you tell the Court what that represents?

THE COURT: Is that Defendant's Exhibit A?

MR. SANDOVAL: Yes, sir.

THE COURT: All right.

A This is a, I believe, Xeroxed copy of my report.

Q I see. Did you ever have occasion to talk to anyone about that report?

A How do you mean, sir? I'm sorry.

Q Did you ever talk to anyone in reference to what that report contained?

A Yes, sir.

Q Do you recall who that person was?

A That would be Mr. Luckel.

Q Do you recall how soon thereafter, that is, after March 29th, '73, you had occasion to talk to Mr. Luckel?

A That would be the early part of June.

[29] Q You had occasion to talk to him in the early part of June?

A Yes, sir.

Q You hadn't talked to him before about this?

A I had contacted Mr. Luckel. He was looking for witnesses for the grand jury—people that had possible knowledge of narcotic traffic in San Antonio. I suggested that Mr. Mandujano probably would make a pretty good witness.

Q I see. Let me ask you this. Do you know the date on that report?

A The date the report was written?

Q Yes, sir.

A Yes, sir.

Q Would you state what the date is?

A June 4th, 1973.

Q Could you explain to us, please, you know, the reason that it took so long for you to make the report?

A The case was aborted. We didn't pursue the case. We closed the case. There was no need to make a report. There was no actual transaction made.

Q Let me ask you this. What prompted you to make the report of June 4th?

A It was brought to my attention the report hadn't been made; also that they wanted details as to what had actually occurred on that day.

Q Sixty-seven days later it was brought to your attention [30] that a report had not been made?

A That is correct.

Q Was this the usual procedure?

A Normally, we don't make a report on an attempt. We might write a short note or a memorandum, information for our files, but on an attempt where no narcotics are purchased or where there is no loss of government money, normally, we just leave it alone.

THE COURT: Well, I understand, Officer, that you made this report so that Mr. Luckel would have access to the facts and circumstances in contemplation of a possible appearance of Mr. Mandujano before the grand jury?

A No, sir. I was informed that they were going to try and charge Mr. Mandujano in regards to perjury before the grand jury, and that they wanted some facts on the actual case, of my conversation with him on the 29th, so then I wrote the report.

Q Let me ask you. Do you have an idea, more or less, when was it that you talked to Mr. Luckel about Mr. Mandujano?

A I presume it would have been in April, sir.

Q Do you remember, more or less, the substance of your conversation?

A They were looking for witnesses for the grand jury.

Q They were looking for witnesses for the grand jury?

A Yes, sir.

[31] Q What I am asking you—

A I'm sorry, I didn't—They were looking for witnesses for the grand jury. I spoke to Mr. Luckel, telling him that I had attempted to purchase—

Q Just a moment. Who approached you on the possibility of procuring witnesses for the grand jury?

A My group supervisor.

Q Did he direct you to Mr. Luckel?

A Yes, that is our Special Attorney out of our office, who is also working with the grand jury.

Q Did you have occasion to talk to your supervisor about Mr. Mandujano?

A Immediately after the case I did, and, after that, not until he asked for witnesses, and I suggested to him that Mr. Mandujano would probably make a pretty good witness.

Q I see. Going back to my previous question, do you recall more or less the substance of your conversation with Mr. Luckel in reference to Mr. Mandujano?

A I told Mr. Luckel that I had attempted a purchase with Mr. Mandujano and through my conversation with him I believed that he had quite a bit of intelligence about the narcotic traffic and trafficking in San Antonio. That was basically what we talked about. He asked me to give him some more details as to Mr. Mandujano, give his name and address, and briefly related my conversation with him on that day as to [32] why I thought he had knowledge of the narcotic traffic here in San Antonio.

Q In other words, the contents of the report is basically what you covered with Mr. Luckel; is this not correct?

A Basically, yes, sir.

MR. SANDOVAL: No further questions.

THE COURT: All right. Mr. Pinckney?

MR. PINCKNEY: I have no questions, your Honor.

THE COURT: All right, you may step down, Mr. Cavalier.

Do you have any other witnesses, Mr. Sandoval?

MR. SANDOVAL: No, your Honor. At this time I would like to introduce into evidence Defendant's Exhibit B, which is the transcript of the grand jury.

THE COURT: You want to offer that in evidence?

MR. SANDOVAL: Yes.

THE COURT: All right. Do you have any objections?

MR. PINCKNEY: None, your Honor.

THE COURT: All right, it will be received in evidence.

MR. PINCKNEY: Your Honor, at this point I would like to give the Court the letter I promised pursuant to your instruction of Friday, and copies are being provided to both counsel for Mr. Rangel and Mr. Mandujano.

[33] THE COURT: All right, I take it, then, Mr. Sandoval has interrogated the witnesses that he wanted. What about you, Mr. Alexander; do you have any witnesses you want to present?

MR. ALEXANDER: No, your Honor, we do not.

THE COURT: Do you have any further evidence?

MR. PINCKNEY: I have no evidence, your Honor.

THE COURT: All right, does anyone have any further evidence to present?

MR. PINCKNEY: The government rests, your Honor.

THE COURT: Do you rest?

MR. ALEXANDER: The defendant Rangel rests.

MR. SANDOVAL: The defendant Mandujano rests, your Honor.

* * * *

[40] THE COURT: Let me ask you this. Suppose that the Court would find that there really was not an indictable offense insofar as Mr. Rangel was concerned. What effect would that have upon the second count of the indictment? And turning it around, just assuming that the Court would find that there was an indictable offense against Mr. Mandujano, would you have a different situation? See, what I am thinking about is, Mr. Luckel testified that he didn't at that time believe in his legal opinion that this was an indictable offense [41] that existed. Now, I wonder just how far this ignorance of the law goes. If a defendant is brought into court and he said he didn't know what the law was, well, they still try him and convict him. I just wonder whether the fact that the United States Attorney, or an attorney representing the government, didn't know—whether he is in a higher position than somebody who is charged with a crime. But be that as it may, if he was right in his belief that insofar as Mr.—as your client was concerned, that there was no indictable offense, then what effect would that have upon the second count? If he was wrong in his belief as to whether or not there was an indictable offense against Mr. Mandujano, what effect would that have on the second count? This is for you and Mr. Sandoval to tell me what you think.

MR. ALEXANDER: I feel the government can't play both sides of the street and say, "Look, before we called you into the grand jury room, we didn't think you did anything wrong, but after you left the grand jury room we decided you had done something wrong." That is what we have.

* * * *

[75] THE COURT: Well, all right. We will take that under advisement and as soon as I hear from you, Mr. Sandoval, [76] I will attempt to make a decision on all of the motions that have been filed.

In the meantime, gentlemen, thank you very much. I want to compliment the candor of Mr. Luckel and the two officers who testified in giving their testimony. I didn't see the slightest evidence of any attempt on their part to withhold anything, and I think they have

testified very frankly and very candidly about it and the facts are there, now, and I will just have to decide what they mean. Thank you, gentlemen.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 74-754

UNITED STATES, PETITIONER

v.

ROY MANDUJANO

ORDER ALLOWING CERTIORARI—Filed March 24, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

A true copy MICHAEL RODAK, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ Laurence P. Gill
Deputy
73-3353

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 572867 139

Supreme Court, U. S.
FILED
MAR 3 1975
MICHAEL RODAK, JR., CLERK

NO. 74 - 754

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

V.

ROY MANDUJANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

MEMORANDUM FOR ROY MANDUJANO IN OPPOSITION

Michael Allen Peters
Attorney for Respondent
1217 Calhoun
Houston, Texas 77002

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

V.

ROY MANDUJANO

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent asks leave to file this response to the United States Petition for a Writ of Certiorari pursuant to Rule 53, in Format Pauperis.

The Attorney for Respondent was Court appointed by the Fifth Circuit of Appeals under the Criminal Justice Act and was directed by the Supreme Court to file a response to the United States of America's Petition for Certiorari.

Respectfully submitted,

Michael Allen Peters

Michael Allen Peters
1217 Calhoun
Houston, Texas 77002
713/237-1001

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74 - 754

UNITED STATES OF AMERICA, PETITIONER

V.

ROY MANDUJANO .

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR ROY MANDUJANO IN OPPOSITION

Petitioner contends that the self-incrimination provision of the Fifth Amendment does not require the giving of Miranda warnings to a person in the status of a putative defendant or an ordinary witness in the grand jury context; and that in the event there are Miranda warnings required but yet were not given, then does this permit a person to commit perjury with impunity when testifying before the grand jury as a putative defendant?

I

A statement as to important dates need be summarized for the Court to consider the questions presented:

(1) March 29, 1973: This is the date on which Roy Mandujano allegedly made an attempted distribution of one ounce of heroin to Dale Agents.

(2) May 2, 1973: The date on which Mandujano was compelled to appear before the grand jury after receiving his subpoena only a week before.

(3) June 4, 1973: The Dale Agents involved made and prepared their report on the incident on March 29, 1973.

(4) June 13, 1973: Roy Mandujano was indicted by the Grand Jury.

When Roy Mandujano was before the Grand Jury on May 2, 1973, the "focus of the investigation" was upon him. The investigation commenced in March 1973 and Mandujano's appearance before the Grand Jury was a continuation of that investigation. The Grand Jury was not merely making a general investigation; rather, there were specific acts upon which the Grand Jury made the focal point of their investigation. The very same specific acts which were the basis of the indictment by the Grand Jury were the same as that incident on March 29, 1973, which the Government agents already had sufficient information to present to the Grand Jury, without Mandujano's appearance being necessary. Thus, there was enough information to indict Mandujano.

The Special Prosecutor before the Grand Jury had already talked with the agents who conducted the investigation. This Special Prosecutor asked specific questions which questions were exactly specific of the incident of March 29, 1973, and indeed focused, not in the realm of general inquiry, but on specific acts which already occurred and had already been investigated by the Government agents.

The Fifth Circuit in United States v. Morado, 454 F. 2d 167 (1972) held that "if the investigation passes beyond the stage of being a general inquiry into an unsolved crime and focused upon a person as a defendant, whom the Government planned to indict and against whom it was gathering incriminating evidence, then the Court would fact the necessity of embracing or rejecting the Rule" (of the virtual or putative Defendant). The Fifth Circuit in United States v. Roy Mandujano, 496 F 2d 1050 (1974) held that Mandujano was a putative Defendant as the focus of the investigation was upon him.

When Mandujano appeared before the Grand Jury the Special Prosecutor knew what was involved and for him to state that he (Special Prosecutor) had no intention of indicting Mandujano for a violation of 21 USC 846 (a) (1) is beyond belief. Subpoening Mandujano to appear before the Grand Jury was just another step by the Government in gathering specific data to use against Mandujano as is evident from the subsequent indictment.

It is not necessary that an accused be under formal arrest prior to the interrogation for Miranda rights to arise. Windsor v. United States, 389 F. 2d 530 (5th Cir., 1968). In Windsor, it was held that Miranda rights had arisen and the Court said, "The Governments Agents' testimony that Windsor was not a suspect and not under arrest when questioned in his motel room is belied by the facts of the case. ...Windsor was definitely the central figure in their investigation..." In Miranda, itself, the Supreme Court explained that "in custody" was a short-hand phrase for what Escobedo v. Illinois, 378 U.S. 478, 490, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), described as an investigation which has focused on an accused. In United States v. Phillips, 443 F. 2d 246 (5th Cir., 1971), the Court in dictum stated that merely because the questioning takes place in familiar surroundings rather than at a police station does not mean that a person is not being subjected to custodial interrogation; nor does a person have to be under formal arrest prior to interrogation for Miranda to arise.

A Grand Jury room could be considered like a police station. In Mattox v. Carson, 424 F.2d 202 (5th Cir., 1970),

the Court held that a Grand Jury investigation was indeed custodial interrogation as was contemplated by Miranda. Consider that Mandujano was compelled to appear in response to a subpoena. Mandujano was further compelled to take the witness stand and had to

BEST COPY AVAILABLE

answer the questions asked. This Grand Jury subpoena and Mandujano's appearance before the Grand Jury was to place him in a "compelling" atmosphere in which he was deprived of his freedom and rights and thereby placed him in a custodial atmosphere.

Miranda applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the Fifth Amendment right against compulsory self-incrimination. After the Miranda warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive these rights. When a person who is not under investigation is compelled to appear before the Government's agent, the Grand Jury, then there is no requirement to administer Miranda warnings and thus there is no impairment of the Grand Jury's effectiveness. Furthermore, not every Grand Jury witness realizes that the Government has incriminating evidence at the time he is called to testify in a putative Defendant nor are Miranda warnings required. The turning point is when the Grand Jury focuses, as they did in Mandujano, upon specific acts, at which time the Grand Jury should and indeed must advise the witness of his Miranda warnings and then the Grand Jury must afford the individual the opportunity to exercise those rights so that an individual can knowingly and intelligently waive those rights.

Mandujano, with his 10th grade education, obviously did not knowingly and intelligently waive his rights let alone understand them as is illustrated by the following questions asked by the Grand Jury Prosecutor:

> "You are required to answer all the questions that I ask you except for the ones that would tend to incriminate you" -- to which Mandujano replied -- "Do I answer all the questions you ask?" (G. TR. 3-4)

The same Special Prosecutor asked Manjujano in the same Grand Jury setting that, "I take that to mean you do not wish the services of a lawyer here today?" --To which Mandujano replied that he had

talked to an attorney and that he could not afford one.(App. A, p. 3A) This response caused the Special Prosecutor to state to Mandujano that the lawyer could not be inside the Grand Jury room but only outside.

Thus, the Special Prosecutor implied to Mandujano that it would do him no good to have an attorney with him anyway. Furthermore, it is very apparent that Mandujano did not understand the questions as to self-incrimination clearly, otherwise, why did Mandujano respond, "Do I answer all the questions you ask?"

Then the Special Prosecutor stated to Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?" To which Mandujano replied, "Yes, sir." (G. Tr. 3-4) In light of Mandujano's already apparent lack of understanding from the previous question regarding incrimination, the question posed by the Special Prosecutor was not only long, but was couched in terms of ambiguity, so much so that the Special Prosecutor himself in the midst of his question, had to rephrase what he thought as is exemplified by the interjection of "in other words".

Further, the word "possibly" created ambiguity and confusion to Mandujano because of the way in which it was used. The Special Prosecutor stated, "... You could 'possibly' be charged with perjury...", which gives an ambiguous meaning that a wrong answer or a false utterance is not perjurious but might be. Because the "warning"given was confusing, not understood, and ambiguous, plus the possible threat that was involved to Mandujaro, there is raised the question as to whether Mandujano may have been compelled in some significant way to testify by the form of the warning or deterred by it from invoking his privilege.

Further, the Government continually presents the question phrased in many guises but limited to a question not raised by the Fifth Circuits holding. The question asked by the Government is whether a Grand Jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination. The proper question should be: whether a "putative" Defendant (someone not just suspected) who is compelled to appear before a Grand Jury must be advised of his Fifth Amendment right as well as to be advised of his Miranda warnings?

Mandujano was not merely suspected of participating in a substantive offense, he was already allegedly known to have done so as the Governments' Dale agents had informed the Special Prosecutor. The Prosecutor states that "he did not consider the transaction to have been an indictable offense" (Tr. 19). The Prosecutor stated that he did not intend to seek an indictment against Mandujanc at that time (Tr. 15-16). The only intent on the part of the Prosecutor was to ask the specific details surrounding the incident on March 29, 1973.

The Government contends that there are additional related issues as to whether the "putative" Defendant concept is to be deferred by reference to subjective criteria reflecting the prosecutor intent of Government attorneys or objective criteria that consider whether the Government possesses incriminating evidence against the witness at the time he is called to testify. Miranda answers the Government's inquiry as to whether subjective criteria or objective criteria determines the status of a witness to be either an ordinary Grand Jury witness or that of a putative Defendant. The test is whether the investigation was specific, focused on a specific violation of the law, and focused specifically upon the individual as the violator, an individual who is the focus of the investigation thereby removes himself from the role of an ordinary Grand Jury witness to that of the putative Defendant, which requires special warnings to be given before further questioning. What is to prevent the Grand Jury from subpoenaing and compelling everyone who was ultimately to be indicted to appear

and testify about those specific matters about which he is ultimately indicted. Consider also the hypothetical regarding the case of a defendant, already indicted, who is compelled by subpoena to appear before a Grand Jury. Is this individual entitled to any type of Miranda warnings? Fifth Amendment Advisement?

As to the crucial point dealing with committing perjury with impunity, as would seem to be the end result of affirming the District Court and Court of Appeals, there comes the question as to whether an agent of the prosecution, be it the Grand Jury or police, can compel a putative Defendant to appear and testify against his Fifth Amendment right. Where a totally unfair procedure is used, such as that which occurred when Mandujano was compelled to appear before the Government's tool, the Grand Jury, elemental fairness requires that the "putative" Defendant be advised of his Miranda warnings and that failure to do so will result in supressing the Grand Jury testimony. Consider the same result if the police fail to advise an accused before a confession is obtained. The test as stated by the Fifth Circuit was based on Potts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 (1942) which stated that: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial."

CONCLUSION

For the forestated reasons it is respectfully submitted that the Government's Petition for a Writ of Certiorari should be denied.

Michael Allen Peters

Michael Allen Peters
Attorney for Roy Mandujano
1217 Calhoun
Houston, Texas 77002
713/237-1001

STATE OF TEXAS X
X AFFIDAVIT OF SERVICE
COUNTY OF HARRIS X

1. My name is Michael Allen Peters.
2. I am licensed to practice law in the State of Texas.
3. I am not licensed to practice before the Supreme Court of the United States.
4. I represent the Respondent, Roy Mandujano, in the Fifth Circuit Court of Appeals on the questions presented for Certiorari.
5. I certify that a true copy was mailed certified, return receipt requested, postage prepaid, to the Solicitor General of the United States, Robert Bork, Department of Justice, Washington, D.C. 20530, on this the 20th day of February, 1975.

Michael Allen Peters
Michael Allen Peters

Sworn to and subscribed to before me the undersigned authority by Michael Allen Peters on this the 20th day of February, 1975, in Houston, Harris County, Texas.

Mark S. Robinson
Notary Public

BEST COPY AVAILABLE

MARK S. ROBINSON
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975

Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-754

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
ROBERT B. REICH,
Assistant to the Solicitor-General,
SHIRLEY BACCUS-LOBEL,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statute involved	2
Statement	3
Summary of argument	9
Argument	16
I. A "putative defendant" called as a grand jury witness is not entitled to be warned of his rights, and the rights of such a witness include neither an absolute right to remain silent nor a right to appointment of counsel	17
A. The failure expressly to advise a "putative defendant" of his self-incrimination privilege does not impermissibly compel his testimony in violation of the Fifth Amendment	19
1. A grand jury setting is not inherently coercive	21
2. Grand jury questioning is no more coercive when the witness is a "putative defendant" than it is otherwise	28
B. The *Miranda* warnings, comprising a "right to remain silent" and a right to appointed counsel, are inappropriate to a grand jury investigation	32

578—801—75——1

Argument—Continued Page

II. Respondent was not a putative defendant when he appeared before the grand jury, since the government did not then intend to seek his indictment.... 40

III. The government's failure to give adequate warnings should not result in the suppression of testimony in a subsequent prosecution for perjury..... 47

Conclusion..... 58

CITATIONS

Cases:

Blackmer v. *United States*, 284 U.S. 421..... 27
Blair v. *United States*, 250 U.S. 273..... 28
Branzburg v. *Hayes*, 408 U.S. 665..... 26, 27, 35, 36
Brown v. *Mississippi*, 297 U.S. 278..... 52
Brown v. *United States*, 245 F. 2d 549..... 56
Brown v. *Walker*, 161 U.S. 591..... 34
Bryson v. *United States*, 396 U.S. 64..... 48, 50
Cargill v. *United States*, 381 F. 2d 849, certiorari denied, 389 U.S. 1041..... 48
Cicenia v. *Lagay*, 357 U.S. 504..... 52
Cobbledick v. *United States*, 309 U.S. 323..... 25
Commonwealth of Pennsylvania v. *Columbia Investment Corp.*, 325 A. 2d 289..... 22
Costello v. *United States*, 350 U.S. 359..... 26, 36
Counselman v. *Hitchcock*, 142 U.S. 547..... 21
Directory Services, Inc. v. *United States*, 353 F. 2d 299..... 38
Escobedo v. *Illinois*, 378 U.S. 478..... 30, 31, 39, 52
Gallegos v. *Colorado*, 370 U.S. 49..... 52
Glickstein v. *United States*, 222 U.S. 139.. 14, 48, 50
Gollaher v. *United States*, 419 F. 2d 520, certiorari denied, 396 U.S. 960..... 26, 38
Groban, In re, 352 U.S. 330..... 12, 24, 38, 39
Grosso v. *United States*, 390 U.S. 62..... 49
Grumbles, In re, 453 F. 2d 119..... 38

Cases—Continued

Page

Hale v. *Henkel*, 201 U.S. 43..... 34
Hamilton v. *Alabama*, 368 U.S. 52..... 39
Hannah v. *Larche*, 363 U.S. 420..... 39
Harris v. *Beto*, 438 F. 2d 116..... 38
Harris v. *New York*, 401 U.S. 222..... 48
Haynes v. *Washington*, 373 U.S. 503..... 51
Hoffman v. *United States*, 341 U.S. 479..... 33, 34
Jenkins v. *McKeithen*, 395 U.S. 411..... 39
Jones v. *United States*, 342 F. 2d 863..... 26, 32
Kastigar v. *United States*, 406 U.S. 441..... 34
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234..... 55
Kirby v. *Illinois*, 406 U.S. 682.... 12, 21, 25, 31, 39
Kitchell v. *United States*, 354 F. 2d 715..... 26
LaRocca v. *United States*, 337 F. 2d 39..... 56
Lefkowitz v. *Turley*, 414 U.S. 70..... 48
Lewis v. *United States*, 348 U.S. 419..... 50
Lewis v. *United States*, 385 U.S. 206..... 55
Liddy, In re, No. 73–1562, C.A. D.C., decided October 10, 1974..... 40
Lowe v. *United States*, 407 F. 2d 1391..... 31
Lynumn v. *Illinois*, 372 U.S. 528..... 51
Maness v. *Meyers*, No. 73–689, decided January 15, 1975..... 34, 48
Mempa v. *Rhay*, 389 U.S. 128..... 39
Marchetti v. *United States*, 390 U.S. 39..... 49
Michigan v. *Tucker*, 417 U.S. 433..... 20, 22, 27, 29, 31, 51, 57
Miranda v. *Arizona*, 384 U.S. 436..... *passim*
Mulloney v. *United States*, 79 F. 2d 566..... 32
Murphy v. *Waterfront Commission*, 378 U.S. 52..... 51
Nardone v. *United States*, 308 U.S. 338..... 32
Perrone v. *United States*, 416 F. 2d 464..... 32
Rogers v. *United States*, 340 U.S. 367..... 34
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 21–22, 23
Sorrells v. *United States*, 287 U.S. 435..... 54

Cases—Continued

	Page
Stanley v. *United States*, 245 F. 2d 427	32
State ex rel. Lowe v. *Nelson*, 202 So. 2d 232	22
State v. *Iverson*, 187 N.W. 2d 1	22
United States v. *Binder*, 453 F. 2d 805	25–26
United States v. *Calandra*, 414 U.S. 338	25, 26, 36, 57
United States v. *Capaldo*, 402 F. 2d 821	26
United States v. *Corallo*, 413 F. 2d 1306, certiorari denied, 396 U.S. 958	22
United States v. *Cross*, 170 F. Supp. 303	56
United States v. *Daniels*, 461 F. 2d 1076	38
United States v. *Del Toro and Kaufman*, C.A. 2, Nos. 74–2021, 74–2035, decided February 27, 1975	53
United States v. *DeSapio*, 299 F. Supp. 436	38
United States v. *Dionisio*, 410 U.S. 1	25, 30
United States v. *DiGiovanni*, 397 F. 2d 409, certiorari denied, 393 U.S. 924	48
United States v. *DiMichele*, 375 F. 2d 959, certiorari denied, 389 U.S. 838	22
United States v. *Fiorillo*, 376 F. 2d 180	55
United States v. *Fruchtman*, 282 F. Supp. 534	43, 44, 56
United States v. *Hall*, 421 F. 2d 540	31
United States v. *Haas*, 126 F. Supp. 817	40
United States v. *Icardi*, 140 F. Supp. 383	56
United States v. *Kahriger*, 345 U.S. 22	50
United States v. *Keenan*, 267 F. 2d 118	40
United States v. *Knox*, 396 U.S. 77	14, 48, 49, 50
United States v. *Kordel*, 397 U.S. 1	34
United States v. *Lazaros*, 480 F. 2d 174, certiorari denied, 415 U.S. 914	56
United States v. *Luxenberg*, 374 F. 2d 241	22, 32, 57
United States v. *McGinnis*, 344 F. Supp. 89	40
United States v. *Monia*, 317 U.S. 424	10–11, 21, 33
United States v. *Morado*, 454 F. 2d 167	40
United States v. *Murdock*, 284 U.S. 141	34

Cases—Continued

	Page
United States v. *Nickels*, 502 F. 2d 1173	48, 55
United States v. *Pacente*, 490 F. 2d 661, rehearing *en banc*, 503 F. 2d 543, certiorari denied, 419 U.S. 1048	48
United States v. *Parker*, 244 F. 2d 943, certiorari denied, 355 U.S. 836	48
United States v. *Pommerening*, 500 F. 2d 92, certiorari denied, 419 U.S. 1088, stay granted, January 16, 1975	48
United States v. *Rangel*, 365 F. Supp. 155, affirmed, 496 F. 2d 1059	8
United States v. *Russell*, 411 U.S. 423	54, 55
United States v. *Ryan*, 402 U.S. 530	25
United States v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897	22, 32, 35
United States v. *Sicilia*, 475 F. 2d 308	31
United States v. *Sweig*, 441 F. 2d 114, certiorari denied, 403 U.S. 932	53
United States v. *Thayer*, 214 F. Supp. 929	56
United States v. *Washington*, 328 A. 2d 98, petition for a writ of certiorari pending, No. 74–1106	22, 32
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	40, 47–48, 53
United States v. *Wong*, C.A. 9, No. 74–1636, decided September 23, 1974, ——, petition for a writ of certiorari pending, No. 74–635	18, 22, 32, 48
United States ex rel. Annunziato v. *Deegan*, 440 F. 2d 304	48
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	33–34
Watts v. *Indiana*, 338 U.S. 49	52

Cases—Continued Page
Constitution, statutes and rule:
Constitution of the United States:
Fourth Amendment 56
Fifth Amendment 2, 9, 10, 11, 17, 19, 20, 21, 22, 26, 27, 28, 29, 32, 33, 38, 46, 49, 50
Sixth Amendment 2, 12, 31, 39, 52
18 U.S.C. 1623 ..... 3, 7
18 U.S.C. 3006A(a) 39
21 U.S.C. 846 7
Fed. R. Crim. P:
Rule 6(a) 24
Rule 6(d) 39
Miscellaneous:
Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964) 45
Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S. Cal. L. Rev. 699 (1974) 31

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-754

UNITED STATES OF AMERICA, PETITIONER

v.

ROY MANDUJANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 496 F. 2d 1050. The opinion of the district court (Pet. App. D) is reported at 365 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 28, 1974. A petition for rehearing was denied on October 16, 1974 (Pet. App. C). On November 12, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 15, 1974 (a Sunday). The petition was filed on December 16, 1974,

and was granted on March 24, 1975 (App. 56). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness must be advised in some manner, prior to testifying, of his Fifth Amendment privilege against compelled self-incrimination; and, if so, whether such a defendant is entitled to complete *Miranda* warnings.

2. Whether every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant."

3. Whether, if a warning of some sort is required, the government's failure to give adequate warning to a "putative defendant" should result in the suppression of his testimony in a subsequent prosecution for perjury.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

STATEMENT

1. In late March 1973, Alfonso Cavalier, an officer with the San Antonio, Texas, Police Department assigned to the Office of Drug Abuse Law Enforcement, received information that respondent was dealing in narcotics (App. 47–48). Cavalier thereupon met respondent at a bar at approximately 1:30 p.m. on March 29 and discussed with him the purchase of one ounce of heroin (App. 47–49). Respondent then made several telephone calls in an effort to procure the heroin (App. 49–50). When his initial efforts proved unsuccessful, he told Cavalier that he would need money in order to obtain the heroin. Cavalier then gave him $650, whereupon respondent left the bar for approximately one hour (App. 49). Upon his return, respondent told Cavalier that he could procure the heroin later that evening when his regular connection appeared at the bar. Respondent returned the money and asked Cavalier to telephone him later that evening to make final arrangements for the sale (App. 49). When Cavalier telephoned the lounge that evening, however, he was unable to reach respondent

578—801—75——2

(App. 49). Because the heroin transaction never occurred, Officer Cavalier did not file a report of these events at the time (App. 51).

Cavalier subsequently informed the government prosecutor, who was seeking witnesses with possible knowledge of narcotics traffic in the San Antonio area to testify before a special grand jury then in session, that respondent would be an appropriate grand jury witness (App. 51). Cavalier told the prosecutor about the aborted heroin transaction and noted that respondent had a regular source for heroin and that respondent was apparently aware of several other sources whom he had attempted to call (App. 45). Accordingly, the prosecutor determined that respondent might be able to provide the grand jury with valuable information about local narcotics traffic (App. 45). As he later testified, however, the prosecutor then had no intention of seeking to indict respondent, at least in part because the prosecutor did not consider an indictable offense to have been committed (App. 42, 44).

2. Respondent appeared before the grand jury on May 2, 1973 (App. 2). At the outset, the following colloquy occurred (App. 5–6):

> Q. * * * Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?
>
> A. Yes, sir.
>
> Q. Have you discussed your presence here with anybody?
>
> A. My wife.
>
> Q. Have you contacted a lawyer in this matter?
>
> A. No, sir, I haven't.
>
> Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> A. I don't have one. I don't have the money to get one.
>
> Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.
>
> A. Yes, sir.
>
> Q. Is that clear?
>
> A. (Nod affirmative).

In order to lay the foundation for broader questions designed to elicit the names of drug traffickers with whom respondent may have had dealings and to gauge the truthfulness of subsequent responses to those broader questions (App. 45–46), the prosecutor first asked respondent if he had ever used heroin or

sold it. Respondent admitted to having used heroin in the past, but stated that he had not used it for approximately four months (App. 13–14). He denied that he had sold heroin since about 1960, when he had been convicted for a narcotics offense (App. 12, 15). The prosecutor then asked respondent if he had discussed the sale of heroin with anyone during the past year and if anyone had ever asked to buy one or more ounces of heroin from him. Respondent denied involvement in any discussion related to the purchase of heroin (App. 15–16). He admitted, however, that when he was addicted he had purchased heroin approximately four times daily in the local area (App. 17), but he denied knowing the names of any local heroin traffickers other than a person named Juan (App. 18–19). Respondent was again asked if he had talked to anyone about selling heroin during the past year and if anyone had given him money to buy heroin (App. 19–20). He denied having had any such discussion or receiving any money (*ibid.*). When asked if he would be able to purchase an ounce of heroin if he had $650, respondent stated that he could not, and that he would not even try to purchase it (App. 20). The prosecutor then stated that according to his information respondent could tell the grand jury more than he had thus far told them about the local heroin business. He asked respondent if he would reveal anything further about local dealers; respondent denied any further knowledge (App. 20–21).

3. The prosecutor subsequently informed Cavalier that he was considering whether to seek an indictment charging respondent with perjury before the grand

jury and needed further details of Cavalier's unsuccessful effort to purchase heroin from respondent in March. Accordingly, on June 4, 1973, Cavalier prepared a report detailing his dealings with respondent (App. 51). Because the prosecutor was uncertain as to whether it was appropriate to draw a perjury indictment against respondent in one or three counts, he reviewed the facts outlined in the report with another government attorney, who then suggested the possibility of charging respondent with an attempt to distribute narcotics in violation of 21 U.S.C. 846 (App. 36).

The prosecutor thereupon decided to seek an indictment charging both offenses (App. 39), and, in a two-count indictment returned June 13, 1973, respondent was charged with having attempted to distribute heroin, in violation of 21 U.S.C. 846, and with having made false declarations before the grand jury, in violation of 18 U.S.C. 1623 (App. 2–4).[1]

4. Prior to trial, respondent moved to suppress his grand jury testimony (App. 23–25). After evidentiary hearings, the district court granted the motion, hold-

[1] The following testimony formed the basis for the false declaration charge (App. 3, 16, 20):

"Q. And you have never told anyone that you would try to get heroin to sell them?

"A. No, sir.

* * * * *

"Q. Have you talked to anyone about selling heroin to them during the last year?

"A. No, sir.

* * * * *

"Q. No one has ever given you any money * * * to go buy them heroin?

"A. No, sir."

ing that respondent had been a "putative" or "virtual" defendant when called before the grand jury and that he therefore had been entitled to full *Miranda* warnings prior to testifying (Pet. App. D, pp. 36A–38A).[2] The district court noted that although a grand jury subpoena is not inherently coercive, respondent was nevertheless subject to custodial interrogation, since he may have perceived himself to be under an apparent compulsion to testify (Pet. App. D, p. 40A).[3]

The court of appeals affirmed, adopting the finding of the district court that respondent was a "virtual or putative defendant" when he appeared before the grand jury and agreeing with the district court that such a "putative defendant" is entitled to full *Miranda* warnings (Pet. App. A, pp. 5A–6A, 12A). The court of appeals construed the district court's finding as

[2] Respondent's motion to suppress was considered jointly with a motion raised under similar circumstances and granted by the district court in *United States* v. *Rangel*, 365 F. Supp. 155 (W.D. Tex.), affirmed, 496 F. 2d 1059 (C.A. 5). In *Rangel*, however, the warning giving the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances arguably raised a question whether Rangel may in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, and because Rangel's case did not present any different and important facet of the issues raised by the instant case, we did not petition in his case.

[3] Respondent was subsequently tried and convicted on the drug charge. His grand jury testimony was not used in that case. His conviction was affirmed by the court of appeals in a separate opinion. *United States* v. *Mandujano*, 499 F. 2d 370 (C.A. 5), and certiorari was denied, 419 U.S. 1114.

establishing that the government had, at the time of respondent's appearance before the grand jury, focused on respondent as "someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence" (Pet. App. A, p. 7A). Finding the warnings given respondent to be inadequate, the court reasoned (Pet. App. D, p. 30A) that the prosecutor's conduct "smack[ed] of entrapment," since it might easily be inferred that the prosecutor was primarily "baiting" respondent to commit perjury, and was therefore "unfair" (Pet. App. A, p. 15A). The court concluded that the entire proceeding violated respondent's due process rights under the Fifth Amendment (Pet. App. A, p. 19A) and therefore agreed with the district court that respondent's allegedly perjurious grand jury testimony should be suppressed.

SUMMARY OF ARGUMENT

The decision of the court of appeals turns upon three conclusions, each of which must be correct in order to support suppression of respondent's allegedly perjurious grand jury testimony: (1) that "putative defendants" should be given full *Miranda* warnings before testifying to a grand jury; (2) that respondent was a putative defendant; and (3) that his testimony was properly suppressed for use in a prosecution based upon its alleged falsity. We contend that the court erred in its disposition of each of these three issues.

1. Neither the interrogation of persons suspected of crime nor the use in evidence of incriminating admissions by a defendant is prohibited by the Fifth Amendment privilege against compelled self-incrimination. Moreover, the requirement of *Miranda* that interrogation be preceded by a full advice of rights is not itself an ingredient of the constitutional privilege but a prophylactic measure designed to neutralize the inherently coercive atmosphere perceived by the *Miranda* majority in the process of incommunicado custodial police interrogation. The fatal flaw in the court of appeals' inquiry into the applicability of *Miranda's* warning requirements to "putative defendants" called before a grand jury lies in the court's failure to consider the terms of the constitutional provision itself, particularly the requirement that there be compulsion of testimony in order to bring the privilege into play.

The salient features of incommunicado police interrogation, outlined at considerable length in the *Miranda* opinion, are markedly different in their potential for overbearing the will of the individual from the characteristics of grand jury questioning. The latter takes place before 23 private citizens, and the proceedings are often recorded, as they were here. The opportunities for use of physical force, threats, or trickery to overcome a witness's determination not to testify are thus virtually non-existent. Accordingly, it has long been recognized by this Court that a grand jury witness must claim the privilege "or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*,

317 U.S. 424, 427. Nothing in this Court's subsequent Fifth Amendment jurisprudence casts any doubt upon the continuing validity of that proposition.

Moreover, the "putative defendant" notion is not useful in making the critical constitutional inquiry into compulsion. The presence or absence of impermissible compulsion is a determination that turns upon the state of mind of the individual, upon the question whether, in the circumstances, it is likely that his will was overborne. If grand jury questioning is to be equated with incommunicado police interrogation as inherently coercive, it is difficult to see why it is more coercive of "putative defendants" than of other witnesses. Indeed, the "putative defendant" concept is not central to the administration of *Miranda* either, since all subjects of custodial police interrogation are entitled to the warnings.

In the present case, respondent was advised prior to testifying that he was not required to supply answers that would tend to incriminate him. If any warning is required to support the voluntariness of grand jury testimony, this, we submit, was a fully accurate and constitutionally adequate statement of respondent's rights. Moreover, the *Miranda* warnings, while appropriate to accomplish their prophylactic objective in the context of police interrogation, are inaccurate in two respects as applied to a grand jury witness. First, and most important, no grand jury witness has an absolute right to remain silent (conversely, no person, whether or not in custody, is obliged to respond to police inquiries). It is the grand jury's function and preroga-

578-801—75——3

tive to obtain answers to questions relating to its investigations into crime, and it is the duty of every citizen to answer the grand jury's inquiries unless he asserts a timely and colorable claim of potential self-incrimination or other testimonial privilege. Nor, from the standpoint of the policies repeatedly enunciated by this Court regarding the role of the grand jury, is it desirable to supply grand jury witnesses with inaccurate and overbroad statements of rights for the purpose of discouraging them from voluntarily testifying.

Similarly, the Constitution does not confer upon unindicted grand jury witnesses a right to appointed counsel, *In re Groban*, 352 U.S. 330, 332–333, and the "putative defendant" standard has recently been rejected in delimiting the scope of the Sixth Amendment right to counsel, *Kirby* v. *Illinois*, 406 U.S. 682. And even if respondent had a right to appointed counsel, the failure to apprise him of such a right could not, in the grand jury context, sufficiently impair the voluntariness of his testimony to establish a violation of the privilege against compelled self-incrimination. This is particularly true in the present case: although the precise words of the *Miranda* formula were not recited, respondent was clearly told to tell the government attorney if he felt a need to consult with counsel.

2. The courts below also erred, we submit, in their determination that respondent was in fact a "putative defendant" at the time he was called before the grand jury. The attorney who conducted the grand jury proceedings testified unequivocally that he had no intention of indicting respondent on drug charges at the time respondent appeared before the grand jury—indeed, he was not even then aware that respondent's activities, as known to the government, constituted an indictable offense. He called respondent because his knowledge of respondent's activities afforded him good reason to believe that respondent could identify persons involved in heroin trafficking in the San Antonio area; and he questioned respondent regarding the known transaction with the undercover agent as a logical introduction to his proposed further line of questioning about the activities of others.

The courts below rejected this explanation, relying instead upon the fact that, although the attorney may not have known it, the information in his possession regarding the incident, to which he alluded in his questioning of respondent, did constitute a sufficient basis for charging respondent with a crime. We submit that it is improper to rely solely upon such an "objective" standard in identifying those grand jury witnesses who should be classified as "putative defendants" entitled to special rights in connection with their grand jury appearance. Such a standard creates grave difficulties for attorneys conducting grand jury proceedings, since they cannot be guided by their subjective prosecutive intentions but must instead hazard a guess as to the likely assessment by an unknown future court.

Moreover, it is common to call as grand jury witnesses individuals who are known or suspected to

be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in the case of most such witnesses, for a variety of reasons, that there is no intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses. Accordingly, if there is to be a "putative defendant" criterion, it is imperative that it be defined principally on the basis of the actual (*i.e.,* subjective) prosecutive intent of the government at the time the witness appears.

3. Even if respondent's privilege against compelled self-incrimination was violated by the administration of insufficient warnings, suppression of his allegedly false testimony in this perjury prosecution was inappropriate. It is well established that witnesses may not avoid improper testimonial compulsion by false swearing. *E.g., Glickstein* v. *United States,* 222 U.S. 139; *United States* v. *Knox,* 396 U.S. 77. Perhaps in an effort to avoid the impact of this doctrine, the court of appeals characterized the summoning and interrogation of respondent as a violation of due process requirements, being of the view that it was inherently unfair to put respondent in a position in which his only wise course appeared (to the court) to be silence, and in which his alternatives to silence were perjury or self-incrimination.

The court's due process rationale overlooks the long line of pre-*Miranda* decisions of this Court dealing with the problem of identifying the kind of interrogation of suspects that offends due process notions. Normal questioning of grand jury witnesses, such as that to which repondent was here subjected, does not begin to approach the outermost boundaries of those due process concepts. Moreover, we submit, it is simply not offensive to any reasonable concept of fairness to call a witness to testify before the grand jury, even one whom the grand jury may indict, unless such witness is compelled to testify by force, threat, or trick. The Constitution contains no policy against voluntary admissions of criminal activity, and frank cooperation with the grand jury may in fact often avert indictment. Moreover, a "putative defendant" may be able to exonerate himself to the satisfaction of the grand jury by his testimony. In any event, we reiterate, it is important to the success of the grand jury's mission (particularly in investigations of matters such as narcotics trafficking or official corruption) that those most knowledgeable about such activities disclose their knowledge to the grand jury, and the voluntary cooperation of such witnesses should be encouraged, not discouraged.

The court of appeals also suggested that the questioning of respondent "smack[ed] of entrapment." However, the concept of entrapment articulated by this Court provides no support whatever for suppression of respondent's testimony. Entrapment exists

only when the government implants in the mind of an innocent person the disposition to commit an offense. Any suggestion that the government here overcame a predisposition on the part of respondent to tell the truth is utterly without foundation.

Finally, even if the questioning of respondent was improper, this is not the kind of impropriety for which the drastic remedy of evidentiary suppression is necessary or appropriate. There is no reason to suppose that any rules that may be announced by the courts regarding the obligations of government attorneys toward grand jury witnesses will be widely ignored or disobeyed, or that other, less drastic responses are not available to deal with instances of disobedience. Moreover, even if it were posited that exclusionary measures are required to assure compliance with such rules, there would be little incremental deterrent effect to be gained from extension of the exclusionary remedy beyond suppression of incriminating testimony to suppression of perjurious testimony. And, in conclusion, the exclusionary remedy is particularly inappropriate in this case, since at the time of respondent's grand jury appearance there were no federal appellate holdings requiring administration of the kinds of warnings found to be required by the court of appeals.

ARGUMENT

The decision of the court of appeals is built on three components, each of which is necessary to the result reached: (1) that a putative defendant may not be called to testify before a grand jury without being

given full *Miranda* warnings, and, by necessary implication, that such an individual has an absolute right to remain silent (*i.e.*, to refuse to give any testimony whatsoever, whether or not incriminating) and also a right to appointment of counsel (discussed in Part I, *infra*); (2) that respondent was, at the time he was called to testify before the grand jury, a "putative defendant" (discussed in Part II, *infra*); and (3) that it is appropriate to suppress the perjurious testimony of a putative defendant who has not been given full *Miranda* warnings (discussed in Part III, *infra*). If the court was mistaken in any of these conclusions, reversal must follow; we contend herein that each conclusion was in error.

I. A "PUTATIVE DEFENDANT" CALLED AS A GRAND JURY WITNESS IS NOT ENTITLED TO BE WARNED OF HIS RIGHTS, AND THE RIGHTS OF SUCH A WITNESS INCLUDE NEITHER AN ABSOLUTE RIGHT TO REMAIN SILENT NOR A RIGHT TO APPOINTMENT OF COUNSEL

Of the three components of the court of appeals' decision, the most significant in terms of its potential impact upon the functioning of our criminal justice system is the holding that putative defendants are entitled to *Miranda* warnings and, perforce, to a far broader right of silence in the face of grand jury inquiry than that conferred by the self-incrimination provision of the Fifth Amendment alone. While the chain of reasoning leading to this conclusion and the constitutional basis from which it is derived are not expressly articulated in the opinion, it seems apparent that the conclusion was rooted to some extent in both

the self-incrimination privilege (Pet. App. A, p. 15A) and the due process requirement (Pet. App. A, p. 19A).

The most pervasive theme sounded in the court of appeals' opinion is that it is unfair and perhaps even improper to call persons to testify before the grand jury when the government has evidence suggesting that such persons may be subject to criminal prosecution and when the interrogation is likely to encompass inquiry into areas where truthful responses could prove incriminating. The same attitude is manifest in the court of appeals' opinion in *United States* v. *Wong,* C.A. 9, No. 74–1636, decided September 23, 1974, petition for writ of certiorari pending, No. 74–635. The remedy prescribed for this perceived impropriety is the giving of full *Miranda* warnings.

At bottom would appear to be the notion that it is probably unwise for persons in the position of Mandujano and Wong to do anything other than invoke their testimonial privilege (Pet. App. A, p. 11A), and that steps should be taken to discourage such witnesses from responding fully to inquiry before the grand jury. It is somewhat doubtful that the giving of full *Miranda* warnings would accomplish this objective in most cases. To the extent that it would have such an effect, however, we submit that the functioning of the grand jury would thereby be seriously impaired without doing real service to the enhancement of constitutional rights. As will be discussed further below (pp. 44–45, 52–53, *infra*), the fruitfulness of a grand jury's inquiry will often depend on its ability to secure information from persons having knowledge

of the type of criminal activity under investigation. Of necessity, such knowledge is most often possessed by those who themselves are involved in or at the fringes of such activities (and who therefore are most likely to fall within the "putative defendant" category). This is especially true in the case of grand juries undertaking broad investigations into as yet undisclosed criminal activity (*e.g.,* the investigation of narcotics trafficking in the San Antonio area by the grand jury before which respondent appeared, or the investigation of police corruption in San Francisco by the grand jury before which Ms. Wong appeared). Truthful testimony by "putative defendants" having knowledge of such activities is often vital to the success of the inquiry and should, so long as it is not the product of improper compulsion or trickery, be assiduously encouraged.

A. THE FAILURE EXPRESSLY TO ADVISE A "PUTATIVE DEFENDANT" OF HIS SELF-INCRIMINATION PRIVILEGE DOES NOT IMPERMISSIBLY COMPEL HIS TESTIMONY IN VIOLATION OF THE FIFTH AMENDMENT

Prior to asking respondent questions, the government attorney managing the grand jury carefully warned him that "[y]ou don't have to answer questions which would incriminate you" (App. 6). We submit that this advice represented an accurate and fully adequate (although constitutionally unnecessary) articulation of respondent's Fifth Amendment rights in the grand jury proceeding. While it is common practice for government attorneys to administer such warnings to grand jury witnesses who are suspected of involvement in the criminal activity under investi-

578-801—75——4

gation, we do not believe that the Fifth Amendment requires their administration, and thus a failure to warn even to this extent entails no violation of constitutional rights. Even in the *Miranda* context of incommunicado custodial interrogation, warnings are not something required by the Fifth Amendment itself, but are simply "prophylactic standards" designed to safeguard the privilege on occasions when it was deemed to be singularly threatened. *Michigan* v. *Tucker,* 417 U.S. 433, 446.

Insofar as the inquiry in a case focuses upon the scope and implementation of the constitutional privilege, first principles dictate that heed be paid to the language by which the privilege is expressed. The self-incrimination clause is directed against "compelled" testimony, and the threshold jurisprudential obligation thus is to consider whether there has been "genuine compusion of testimony" (*id.* at 440) or "compulsion sufficient to breach the right against compulsory self-incrimination" (*id.* at 445). The questioning of respondent before the grand jury entailed no compulsion of this kind and thus in no way invaded his constitutional rights.

The court of appeals' conclusory assertion that the Fifth Amendment requires that "putative defendants" appearing as witnesses before the grand jury be given *Miranda* warnings prior to testifying is predicated upon a false analogy between the status of such witnesses and the situation of an arrested suspect during incommunicado police interrogation (whose responses are presumed by the courts to have been coerced ab-

sent express warning and waiver of rights). The analogy fails for two reasons: (1) the presumption adopted by this Court as the basis for its ruling in *Miranda*—that incommunicado custodial police interrogation is inherently coercive (*Kirby* v. *Illinois,* 406 U.S. 682, 688)—is simply inapplicable to the grand jury setting; and (2) a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not.

1. A grand jury setting is not inherently coercive

While the privilege against compulsory self-incrimination applies to proceedings before a grand jury, *Counselman* v. *Hitchcock,* 142 U.S. 547, there is no basis in the logic or history of the Fifth Amendment for requiring government attorneys to administer a set of preliminary warnings to any grand jury witness.

The Fifth Amendment speaks of compulsion. "It does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him." *United States* v. *Monia,* 317 U.S. 424, 427. On the contrary, a grand jury witness "must claim * * * [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Id.* at 427. Nor does failure to advise of rights make subsequent testimony any less voluntary. "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances * * *. [T]he fail-

ure * * * to advise * * * [of] rights * * * [is] not in and of [itself] determinative." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226–227.[4]

It is the particular nature and setting of incommunicado police interrogation that tends to create, in this Court's view, so great a danger of compulsory self-incrimination as to require "practical reinforcement" (*Michigan* v. *Tucker,* 417 U.S. 433, 444) of the privilege through the procedural safeguard of explicit warnings (*Miranda* v. *Arizona,* 384 U.S. 436). But the police interrogation environment contrasts sharply with the nature of the grand jury and the setting in which grand jury questioning occurs. In a grand jury investigation, to an even greater degree than in a normal consent search, "there is no evidence of any in-

[4] Indeed, most courts that have considered the issue have concluded that no grand jury witness, including a potential or "putative" defendant, is entitled to express Fifth Amendment warnings prior to testifying. See, *e.g., United States* v. *Scully,* 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo,* 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *DiMichele,* 375 F. 2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; *Commonwealth of Pennsylvania* v. *Columbia Investment Corp.,* 325 A. 2d 289 (Pa. Sup. Ct.); *State ex rel. Lowe* v. *Nelson,* 202 So. 2d 232 (Fla. Ct. App.). But see *United States* v. *Luxenberg,* 374 F. 2d 241, 246 (C.A. 6); *United States* v. *Wong, supra; State* v. *Iverson,* 187 N.W. 2d 1, 16 (N.D. Sup. Ct.). The District of Columbia Court of Appeals has recently held that a "putative defendant" must be given *Miranda* warnings before appearing in the grand jury room for questioning and must also be informed that he is considered to be a "putative defendant." *United States* v. *Washington,* 328 A. 2d 98, 99–100 (D.C. Ct. App.), petition for a writ of certiorari pending, No. 74–1106.

herently coercive tactics—either from the nature of the * * * questioning or the environment in which it [takes] place. Indeed, * * * the specter of incommunicado police interrogation in some remote station house is simply inapposite." *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 247.

Even a brief glimpse at the *Miranda* opinion reveals how different grand jury questioning is from the factors that troubled the Court in *Miranda.* As that opinion noted, the danger of compulsion during police interrogation arises principally from the fact that the interrogation occurs in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation'" (384 U.S. at 449; emphasis in original). Privacy is "essential to prevent distraction and to deprive [a suspect] of any outside support" (*id.* at 455). The police may then "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion over long periods of time (*ibid.*).

Indeed, as this Court also recognized in *Miranda,* "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery" (*id.* at 461). By contrast to the incommunicado setting in which police interrogation occurs,

grand jury questioning takes place in the presence of no fewer than 16 private citizens (Rule 6 (a), Fed. R. Crim. P.) who——

> bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. *It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.* [*In re Groban,* 352 U.S. 330, 346–347 (Black, J., dissenting; emphasis supplied).]

Moreover, grand jury questioning is at all times under the supervision of a presiding judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, there is little if any likelihood that a government attorney who questions a witness on behalf of the grand jury could resort to any of the coercive tactics potentially employable by police officers during incommunicado police interrogation. Nor, unlike police interrogation where "[p]rivacy results * * * in a gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra,* 384 U.S. at 448), is there the possibility that—should coercive tactics be employed during grand jury questioning—it may go undetected and be unreviewable on a subsequent claim that the privilege was violated.

Nor does compliance with a subpoena to testify before the grand jury deprive a person of "his freedom of action in any significant way"—a factor that

the Court in *Miranda* construed to be a hallmark of "custody" since it is the "point that our adversary system of criminal proceedings commences" (384 U.S. at 477; but cf. *Kirby* v. *Illinois, supra*). To the contrary, as this Court noted in *United States* v. *Dionisio,* 410 U.S. 1, 10:

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *. "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." [Citations omitted.]

Moreover, the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and decide to what extent (if at all) he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of a subpoena in a show cause hearing. *United States* v. *Ryan,* 402 U.S. 530, 533; *Cobbledick* v. *United States,* 309 U.S. 323. And, after he has appeared, he is free to resume his daily activities. See *United States* v. *Calandra,* 414 U.S. 338, 343.[5]

---

[5] It has generally been recognized heretofore that in responding to a grand jury subpoena a witness is not placed in "custody." See, *e.g.*, *United States* v. *Binder,* 453 F. 2d 805, 809

Finally, in its attempt to equate a grand jury investigation to custodial police interrogation, the court of appeals utterly failed to recognize the vast difference in history and function of the two processes. The institution of the grand jury—unlike custodial police interrogation—is deeply rooted in Anglo-American history, serving for centuries "both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra,* 414 U.S. 338, 343. The founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello* v. *United States,* 350 U.S. 359, 361–362.

The grand jury's historic functions survive to this day. "Its responsibilities continue to include * * * the protection of citizens against unfounded criminal prosecutions," *United States* v. *Calandra, supra,* 414 U.S. at 343, and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement" (*ibid.*). See also *Branzburg* v. *Hayes,* 408 U.S. 665, 686–700. Indeed, precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long-

(C.A. 2); *Gollaher* v. *United States*, 419 F. 2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *Kitchell* v. *United States*, 354 F. 2d 715 (C.A. 1); *United States* v. *Capaldo*, 402 F. 2d 821 (C.A. 2); *Jones* v. *United States*, 342 F. 2d 863 (C.A.D.C.)

standing principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings" (*Branzburg* v. *Hayes, supra,* 408 U.S. at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. *Blackmer* v. *United States,* 284 U.S. 421, 438.

The court of appeals imposes on this constitutional process the administration of a set of warnings—"not themselves rights protected by the Constitution" (*Michigan* v. *Tucker, supra,* 417 U.S. at 444)—that are likely to discourage citizens from providing the grand jury with information it needs to carry out its functions under the Fifth Amendment (it is, after all, the premise of the court's decision that the witness who has been warned will be less likely to testify fully and freely). The *Miranda* warnings, however, were never intended to create "a constitutional straitjacket" (*Miranda, supra,* 384 U.S. at 467) to be applied across the board to every form of official questioning. The words of the Court in delimiting its holding in that opinion are especially pertinent with regard to its inapplicability to grand jury proceedings (*id.* at 477–478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling

atmosphere inherent in the process of in-custody interrogation is not necessarily present.[6]

The court of appeals' blanket requirement that every so-called "putative defendant" be given *Miranda* warnings prior to testifying before the grand jury is, moreover, predicated upon difficult forecasts about who is apt to be indicted (see Part II, *infra*). Yet as this Court stated in *Blair* v. *United States*, 250 U.S. 273, 282: "[T]he scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation * * *."

2. Grand jury questioning is no more coercive when the witness is a "putative defendant" than it is otherwise

The fact that a grand jury witness is suspected of involvement in criminal activity of the sort under investigation by the grand jury (and is thus, under the definition of the courts below, a "putative defendant") has no constitutionally significant bearing on the question whether his testimony has been compelled in violation of the Fifth Amendment.

---

[6] The Court in *Miranda* underscored its distinction between incommunicado police interrogation, necessitating *Miranda* warnings, and "general questioning of citizens in the fact finding process," by reference to the opinion of a Scottish court which noted that while "'[i]n former times such questioning * * * would be conducted by police officers visting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend, * * * [the modern practice of interrogation at the station house] must normally create a situation very unfavourable to the suspect.' *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J.C.)." (384 U.S. at 478, n. 46).

Indeed, the court of appeals' opinion gives no indication of why or how "putative defendant" status bears on the question of compulsion. The opinion simply adverts to the line of Fifth Circuit cases indicating that such status is pertinent in determining whether police interrogation of a suspect is "custodial" so as to require administration of *Miranda* warnings (Pet. App. A, p. 9A). No doubt the "virtual defendant" concept is useful in determining whether, in an otherwise ambiguous factual context, a particular police-citizen contact amounts to an arrest. But its utility for the purpose of evaluating such incidents and attaching legal significance to ambiguous facts hardly establishes its relevance to the question whether grand jury questioning of such witnesses is inherently coercive and, if so, whether the administration of *Miranda* warnings is a suitable remedy to counteract the coercion.

In fact, we submit that a witness's answers before the grand jury are no more likely to be compelled because he is suspected of involvement in the criminal activities that the grand jury is investigating than if he is not. Such a person may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other witness who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.'" *Michigan* v. *Tucker*, *supra*, 417 U.S. at 439.

To be sure, one suspected of involvement in the type of criminal activity under investigation faces a greater likelihood that he will be asked questions calling for responses that may be incriminating. But that fact alone has no bearing upon the voluntariness of the responses. "The obligation to appear [before the grand jury] is no different for a person who may himself be the subject of the grand jury inquiry." *United States* v. *Dionisio,* 410 U.S. 1, 10, n. 8. Once called, his responses are presumed to be as voluntary as those of any other witness.

Even in the *Miranda* context of police interrogation, the "putative defendant" concept is irrelevant in defining the right to warnings. If the police arrest a citizen and take him to the stationhouse for interrogation, he is entitled to *Miranda* warnings even if the police have no basis for suspecting him of a crime and no intent to prefer charges against him.

Nor is a grand jury witness against whom the government has incriminating evidence thereby "in custody" or otherwise "deprived of his freedom of action in any significant way" to a greater extent than a normal grand jury witness. Our adversary system of criminal proceedings is triggered by discrete governmental procedures, such as arrest or indictment, that impose particular restraints distinct from the kind of restraints imposed upon all citizens as a result of their obligations of citizenship. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478, 490–491.

The government's mere knowledge or intention with regard to a particular individual, unaccompanied by any action or procedure that treats him differently

from other individual with whom the government deals—such as other grand jury witnesses who are called to testify because they also are likely to possess information useful to enable the grand jury to fulfill its constitutional function—does not itself initiate criminal proceedings or result in "custody." Cf. *Kirby* v. *Illinois,* 406 U.S. 682, 689. "The test [for determining "custody"] must be an objective one. Clearly the Court [in *Miranda*] meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source." *United States* v. *Hall,* 421 F. 2d 540, 544 (C.A. 2) (Friendly, J.; emphasis in original); see also *Lowe* v. *United States,* 407 F. 2d 1391 (C.A. 9); *United States* v. *Sicilia,* 475 F. 2d 308 (C.A. 7).[7]

[7] The "focus" rationale employed by the court of appeals may derive from *Escobedo* v. *Illinois,* 378 U.S. 478, 490–491, where the Court held that the fact that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" was *one* factor to be considered in ascertaining whether the accused had been denied the assistance of counsel in violation of the Sixth Amendment. In *Miranda* this Court clarified what it meant by the "focus" concept: "what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused" was the objective reality of "custody" or "[deprivation] of * * * freedom * * * in any significant way" (*Miranda, supra,* 384 U.S. at 444 and n. 4). See also Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?,* 25 S. Cal. L. Rev. 699 (1974). Moreover, *Escobedo* is not to be extended beyond its particular facts, *Michigan* v. *Tucker, supra,* 417 U.S. at 438, and is clearly inconsistent with more recent views of the subject, *e.g., Kirby* v. *Illinois, supra.*

B. THE *MIRANDA* WARNINGS, COMPRISING A "RIGHT TO REMAIN SILENT" AND A RIGHT TO APPOINT COUNSEL, ARE INAPPROPRIATE TO A GRAND JURY INVESTIGATION

Even assuming that respondent was constitutionally entitled to the warning that he in fact received prior to testifying before the grand jury, informing him of his right not to answer questions if the answers would tend to incriminate him, he was constitutionally entitled to no more.[8] The court of appeals' requirement

We do not argue here that a defendant who has already been indicted for a crime or against whom an information or complaint has been filed need not be advised of his privilege against self-incrimination prior to testifying before the grand jury. It may well be that in these circumstances, where the criminal process has already commenced, the Fifth Amendment requires certain special procedural safeguards. Several courts have made this distinction. See, *e.g.*, *United States* v. *Scully*, *supra*; *Perrone* v. *United States*, 416 F. 2d 464, 466 (C.A. 2); *Jones* v. *United States*, 342 F. 2d 863, 870 (C.A.D.C.); *Mulloney* v. *United States*, 79 F. 2d 566, 579 (C.A. 1).

[8] Among the courts that have required that a "putative defendant" before the grand jury be given some Fifth Amendment warning, there has been significant variation as to precisely how much warning is appropriate. Although the Sixth Circuit has suggested that "putative defendants" should be warned prior to testifying before the grand jury of their privilege against compulsory self-incrimination, in no case has the Sixth Circuit intimated that any blanket "right to remain silent" or right to consult with appointed counsel should be available (see *United States* v. *Luxenberg*, *supra*; *Stanley* v. *United States*, 245 F. 2d 427, 434). The Ninth Circuit, in *United States* v. *Wong*, *supra*, required only that the "putative defendant" be apprised of a "right to remain silent" and did not advert to a right to counsel. The District of Columbia Court of Appeals, in *United States* v. *Washington*, *supra*, required, in addition to complete *Miranda* warnings, that the warnings be administered prior to the time that the putative defendant appears in the grand jury room for questioning and that he be informed that he is considered to be a "putative defendant."

that a "putative defendant" before the grand jury be given complete *Miranda* warnings reflects a totally inappropriate application to grand jury investigations of the rationale of *Miranda* and creates in effect two additional entitlements that have no foundation in Fifth Amendment logic or precedent: a "right to remain silent" before the grand jury, and a right to have access to appointed counsel during grand jury questioning.[9]

1. No witness appearing before a grand jury has a "right to remain silent" in response to any grand jury questions he does not wish to answer. Rather, he may claim his Fifth Amendment privilege against compulsory self-incrimination, but that is available only when it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U.S. 479, 486–487; see also *United States* v. *Monia*, *supra*, 317 U.S. at 427; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273

[9] Respondent was also not advised in this case that his testimony could be used against him in future proceedings, perhaps because, according to the attorney who presented evidence to the grand jury, there was "no intent to present any indictment" against respondent at the time (App. 42). Unlike the "right" of silence and to appointed counsel, advice regarding possible future adverse use of respondent's testimony would have been an accurate statement of the law. For the reasons previously stated, however, it was not constitutionally necessary that respondent be so advised in order to preserve the voluntary quality of his testimony.

U.S. 103, 113; *United States* v. *Kordel,* 397 U.S. 1, 10. Nor is the witness's decision about the potentially self-incriminating nature of the question necessarily determinative. If the court decides that he has improperly invoked the privilege, he must nevertheless answer the question. *Hoffman, supra;* cf. *Maness* v. *Meyers,* No. 73–689, decided January 15, 1975. And even if he has properly invoked the privilege, he may nevertheless be compelled to respond, under penalty of contempt, if the court grants him immunity coextensive with the privilege. *Kastigar* v. *United States,* 406 U.S. 441. Moreover, once he proffers an incriminating fact, he cannot then refuse to testify further regarding details of that fact. *Rogers* v. *United States,* 340 U.S. 367, 373.[10]

Strictly speaking, indeed, the privilege against compulsory self-incrimination does not entail an across-the-board "right to remain silent" in any context. Rather, it has been thought necessary, in order to safeguard the privilege, to advise individuals of a "right to remain silent" during police interrogation, in part to counteract the possibility that a decision to speak about non-privileged matter in that setting could be used by the police (through trickery, cajolery or other incommunicado tactics) as a means of eliciting incriminating matter (see *Miranda, supra,* 384 U.S. at 476–477). Realistically, the "right to remain silent" is, in this context, simply a recognition that the police (in contrast to grand juries) are not empowered in our legal system to demand that citizens respond to their inquiries. This "right to remain silent" in the face of police interrogation, moreover, is by no means confined to "putative defendants" but extends to the most upright and law-abiding citizen as well.[11]

[10] Moreover, the decisions of this Court are explicit in holding that the privilege "is solely for the benefit of the witness" *United States* v. *Murdock*, 284 U.S. 141, 148, and "is purely a personal privilege of the witness." *Hale* v. *Henkel*, 201 U.S. 43, 69. A refusal to answer cannot be justified by a desire to protect others from punishment, *Brown* v. *Walker*, 161 U.S. 591, much less to protect another from interrogation by the grand jury, *Rogers* v. *United States*, *supra*, 340 U.S. at 371.

The court of appeals' equation of the grand jury with the police in this context, aside from being at sharp odds with Court precedent, is also unjustifiable as a matter of constitutional policy. It materially undermines the grand jury's legitimate power of investigation and gives witnesses such as respondent, who possess information material to the grand jury's investigation, the power effectively to block or impede the grand jury's inquiry into non-privileged matter. In the grand jury's context the privilege against compulsory self-incrimination traditionally stands as an exception to the 'longstanding principle that 'the public * * * has a right to every man's evidence.' " *Branzburg* v. *Hayes, supra,* 408 U.S. at 688. Indeed, "[t]he duty to testify may on occasion be burden-

[11] Similarly, a defendant's right not to take the stand at his trial on criminal charges derives from the possibility that his invocation of the privilege as to particular questions might permit the jury to draw an ineradicably prejudicial inference of guilt (see *United States* v. *Scully*, *supra*, 225 F. 2d at 115–116). Neither of these special considerations is present in the context of a grand jury investigation.

some and even embarrassing. It may cause injury to a witness' social and economic status," *United States* v. *Calandra, supra,* 414 U.S. at 345, yet the public's overriding interest in full disclosure before the grand jury may not be overborne except by a valid self-incrimination claim (or other recognized testimonial privilege). As this Court has repeatedly recognized, "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra, supra,* 414 U.S. at 344, citing *Branzburg* v. *Hayes, supra,* 408 U.S. at 700; *Costello* v. *United States,* 350 U.S. 359, 364.

2. While the opinion of the court of appeals never actually discusses the right of a "putative defendant" called before the grand jury to appointed counsel, it notes that respondent was not advised of that right (Pet. App. A, pp. 2A–3A and n. 1), and a determination that such a right exists is implicit in the holding that full *Miranda* warnings are a precondition to lawful interrogation. This conclusion too reflects an unwarranted and totally inappropriate application to grand jury investigations of the rationale of *Miranda,* where access of an arrested suspect to the advice of counsel prior to custodial interrogation was considered necessary to counteract the special hazards of compulsion found to be prevalent in that context. With those fears absent in the grand jury setting, for the reasons already discussed, gone too is the need for the special prophylactic measures prescribed by *Miranda.*

Before proceeding to a discussion of the broad legal issue posed by this aspect of the decision of the court of appeals, it is appropriate to note that, while re-

spondent was not told he could have appointed counsel in the precise words of the *Miranda* warning, he was told that he could halt the proceedings at any time if he felt the need to consult a lawyer (App. 6; emphasis supplied):

> Q. Have you discussed your presence here with anybody?
>
> A. My wife.
>
> Q. Have you contacted a lawyer in this matter?
>
> A. No, sir, I haven't.
>
> Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> A. I don't have one. I don't have the money to get one.
>
> Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. *Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.*
>
> A. Yes, sir.
>
> Q. Is that clear?
>
> A. (Nod affirmative).

It may be desirable as a matter of policy to provide grand jury witnesses who are potential defendants with appointed counsel if they cannot afford their own, but it is not constitutionally mandated.[12] To the

[12] Although there is considerable doubt that such a practice is authorized by statute (see note 14, *infra*), we understand that it is common practice in the federal system to appoint counsel for indigent grand jury witnesses requesting such assistance, and it seems likely that a request by respondent for appointment of counsel would have been honored.

contrary, this Court has recognized that the Constitution does not require that grand jury witnesses be represented by counsel (*In re Groban, supra,* 352 U.S. at 332–333):

> A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, * * * [although] evidence obtained may possibly lay a witness open to criminal charges. * * * Until [such charges are made] his protection is the privilege against self-incrimination. [Citations omitted.][13]

Miranda's creation of "a limited Fifth Amendment right to counsel" (*Miranda, supra,* 384 U.S. at 537, White, J., dissenting) during custodial police interrogation, where "circumstances * * * can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" (*id.* at 469), is manifestly inapplicable to grand jury investigations, for the reasons already stated. Nor can such an alleged right of access to counsel during grand

[13] In rejecting claims of a right to counsel before the grand jury, courts generally have not distinguished between the presence of counsel in the grand jury room and access to counsel outside the room. See, *e.g.*, *Directory Services, Inc.* v. *United States*, 353 F. 2d 299 (C.A. 8); *Gollaher* v. *United States*, 419 F. 2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *In re Grumbles*, 453 F. 2d 119 (C.A. 3); *Harris* v. *Beto*, 438 F. 2d 116 (C.A. 5). A few courts, however, have expressly rejected the notion that the Fifth Amendment requires that a grand jury witness have access to counsel within or without the grand jury room. See *United States* v. *Daniels*, 461 F. 2d 1076 (C.A. 5); *United States* v. *DeSapio*, 299 F. Supp. 436, 440 (S.D. N.Y.).

jury investigations be found in the Sixth Amendment. While this Court initially embarked on a course that might ultimately have led to recognition of a Sixth Amendment right to counsel for "putative defendants" (see *Escobedo* v. *Illinois, supra*), it quickly abandoned that analysis in *Miranda* and has recently indicated that the Sixth Amendment right to counsel does not attach prior to "[t]he initiation of judicial criminal proceedings." *Kirby* v. *Illinois,* 406 U.S. 682, 689; *Michigan* v. *Tucker, supra,* 417 U.S. at 438."

Although there has been, since the decision in *Groban,* a considerable expansion of constitutionally recognized procedural rights of actual and even prospective criminal defendants, including the right to counsel at various post-arrest or post-indictment stages (*e.g., Hamilton* v. *Alabama,* 368 U.S. 52; *Mempa* v. *Rhay,* 389 U.S. 128), this Court has been at pains to make clear that these requirements are not automatically to be extended to the necessarily wide-ranging and traditionally non-adversarial grand jury context. See *Jenkins* v. *McKeithen,* 395 U.S. 411, 430; *Hannah* v. *Larche,* 363 U.S. 420, 449.

[14] While not conclusive of the constitutional question, we note that, unless a Sixth Amendment right to counsel has attached, a grand jury witness who is not under arrest and has not been formally charged has no right to appointed counsel under the Criminal Justice Act of 1964. See 18 U.S.C. 3006A(a). Moreover, Rule 6(d), Fed. R. Crim. P., expressly limits the persons who may be present while the grand jury is in session to "[a]ttorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device."

II. RESPONDENT WAS NOT A "PUTATIVE DEFENDANT" WHEN HE APPEARED BEFORE THE GRAND JURY, SINCE THE GOVERNMENT DID NOT THEN INTEND TO SEEK HIS INDICTMENT

Even assuming that a "putative defendant" is constitutionally entitled to complete *Miranda* warnings prior to testifying before the grand jury, we submit that the wrong standards were used by the courts below in defining who is a "putative defendant" and that respondent was not a "putative defendant" when he appeared before the grand jury, because the government did not then intend to seek his indictment.[15]

The special attorney who had presented witnesses to the grand jury testified that, while he knew of the transaction between respondent and Officer Cavalier, respondent was not a target for indictment at the time he was called to testify before the grand jury: "I had no idea that he would be indicted. I had no intent to present any indictment, to pursue an indict-

[15] Courts have resorted to a variety of imprecise categories for characterizing the individual who falls somewhere between an ordinary grand jury witness and an actual defendant: a *de facto* defendant (*United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955); probable defendant (*United States* v. *McGinnis*, 344 F. Supp. 89, 94 (S.D. Tex.)); prospective defendant (*United States* v. *Haas*, 126 F. Supp. 817, 818 (S.D. N.Y.)); target defendant (*In re Liddy*, 506 F. 2d 1293 (C.A. D.C.); potential defendant (*United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7)); virtual defendant (*United States* v. *Morado*, 454 F. 2d 167, 173 (C.A. 5)). The imprecision and variety of the categories is matched by a similar imprecision with regard to the weight to be given various subjective factors (the government attorneys' knowledge or intention) and objective factors (the amount of incriminating evidence) in determining whether a given witness comes within the category.

ment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano" (App. 42). Indeed, the attorney testified that he had not even realized at the time that the uncompleted transaction between respondent and the officer was an indictable offense (App. 44), and he only learned that it was when later reviewing a possible perjury indictment with another government attorney (App. 36). Officer Cavalier testified that because there had been no "actual transaction," the case had been closed (App. 51).

The foregoing testimony was uncontroverted, and at the conclusion of the hearing the district court expressed the belief that the special attorney and the officer had testified "very frankly and very candidly" (App. 54–55). Nevertheless, the district court's written opinion concluded that "though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants" (Pet. App. D, p. 29A). This conclusion appears to have been based on the fact that the questioning of respondent specifically covered the information known to the attorney regarding the attempted sale to Officer Cavalier and the fact that such information, if accurate, tended to establish the commission of a criminal offense.

It is unclear from the district court's discussion whether it meant to find that the special attorney had

testified falsely in his unqualified assertion that there was no thought of indicting respondent at the time he was called to testify, or whether, as seems more likely, it rested its conclusion on an objective standard measured by the "high likelihood that the answers provided by * * * [respondent] would furnish material for further action on the part of the government" (Pet. App. D, p. 30A). If the former, the conclusion is contrary to the evidence and clearly erroneous (at least in the absence of a finding that disbelief was rooted in the demeanor or credibility of the special attorney, and there is no intimation of any such finding). The conclusion that the special attorney had an "eye on a possible prosecution" rested on the fact that the questioning of respondent covered the specific, known incident (*id.* at 29A); but the reason for that approach was fully and reasonably explained by the special attorney in his testimony (App. 45–46):[16]

> Q. All right, sir. Now, on your direct testimony, in response to Attorney Sandoval's questioning as to your prior knowledge of this event and your asking questions as to this prior dealing with Officer Cavalier by defendant Mandujano, is that a standard procedure that

[16] The reason for calling respondent as a witness was also clearly and reasonably explained (App. 45): "Officer Cavalier saw him place several calls, and Mr. Mandujano stated to Officer Cavalier that he would try to get such and such a source to provide the heroin, on and on like that. Now, we wanted to get the details of this activity. In other words, who these sources for Mr. Mandujano are and whatever details the grand jury could determine of the actions of these potential sources, potential, clearly potential, inasmuch as they came from statements given by Mr. Mandujano and activity by him."

you use in interrogating witnesses before a grand jury—to have prior knowledge to inquire about?

A. I don't believe we subpoenaed any witness that we didn't have an existing body of knowledge about, and in virtually every case we would ask questions about facts that we did have. That was, number one, a method to gauge the truthfulness of the person's testimony, and, number two, it was in the nature of a natural progression to result in answers to the ultimate questions. * * * In the case of Mr. Mandujano we had information which led me to believe that he was being supplied heroin by one person regularly and possibly several other persons, and before I could determine whether—who these people were, the circumstances of the deliveries and whatever, I had to go through the step of determining whether he ever offered to get heroin for anybody or to sell heroin.

In view of the cogency of this uncontroverted explanation, we think it more likely that the district court disregarded rather than disbelieved the government attorney's denial of prosecutive intent. In so doing, and in emphasizing instead the incriminating evidence available to the government prior to grand jury questioning, the district court relied (Pet. App. D, pp. 34A–35A) upon a test for identifying a "putative defendant" that previously had been employed by the district court for the Northern District of Ohio in *United States* v. *Fruchtman,* 282 F. Supp. 534, 536 (where a similar denial by the government that the witness had been considered a potential defendant at

the time of grand jury questioning was deemed irrelevant):

> [It] does not appear that the examination would have been conducted any differently if [the witness] had [been a potential defendant] * * *. [A] man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.

This test for determining who is a "putative defendant"—looking to whether there was incriminating evidence available to the prosecutor prior to questioning—would in effect bring every grand jury witness against whom the government has some potentially incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no actual intention of seeking an indictment—because the witness (perhaps occupying a lower echelon of an ongoing criminal enterprise) is more valuable as a source of evidence against others; because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him; or because the evidence is deemed inadequate to indict. Indeed, the district court's broad test would discourage the cooperation of precisely those witnesses whose knowledge of illegal activities is most crucial to the grand jury's efforts to determine whether crimes have been committed and, if so, who is involved.

Moreover, the test presents numerous and varied problems for both prosecutors and courts because

of the difficulty of identifying who is within the "putative defendant" category. If an attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and therefore fails to administer appropriate warnings, the witness is then free to perjure himself with impunity, since the sanctions for perjury thereby evaporate. Conversely, the ordinary witness given *Miranda* warnings as a precaution against the possibility of a subsequent determination that he had been a "putative defendant" may be inhibited from providing the grand jury with useful or needed evidence (perhaps out of fear that he is indeed a prospective defendant). Commentators have stressed the problems inherent in the so-called "objective" test for determining who is a "putative defendant" at the time of grand jury questioning:

> The widespread and intricate investigations by federal grand juries * * * do not lend themselves to simple tests of "focus" or "purpose" or even "probable cause." The existence of probable cause may conceivably be determined after analysis of a lengthy record, but when the grand jurors or prosecutors have not yet analyzed their record, * * * they may not realize it. Yet hindsight * * * particularly if the test is to be objective, could serve to vitiate much of their work by suppressing testimony taken [while the record is being made]. [Enker and Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois,* 49 Minn. L. Rev. 47, 74 (1964).] [17]

[17] This highlights an important distinction, seemingly overlooked by the courts below, in the types of grand jury inquiries that can exist. Sometimes there is a known and

If a "putative defendant" must be warned of his Fifth Amendment rights prior to testifying before the grand jury, we submit that the proper test for identifying him should require that a subjective as well as an objective standard be satisfied, with principal emphasis on the former. That is, it must be established *both* that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted, and that the government possessed substantial evidence to support an indictment at the time the witness appeared to testify before the grand jury. Under this test, as we have indicated, respondent was not a "putative defendant" when he appeared before the grand jury.

We submit, moreover, that there is no significant pragmatic objection that can fairly be made to the use of a subjective standard in this area. The only hazard it presents in the fact-finding process is the risk of false testimony regarding the state of mind of the government attorneys at the time the witness was called to testify. Whatever may be said regarding

---

reported crime (perhaps an assault or a bank robbery) and the grand jury is convened for the purpose of considering indictment of a particular suspect; in such a context, the "putative defendant" concept as elaborated in this case is adequate. In many other cases, of which this is one, the grand jury's efforts are directed toward uncovering the very existence of secret criminal activity (*e.g.*, most probes of official corruption, broad-based inquiries into narcotics trafficking or extortionate credit transactions, or the like). In such instances, the "objective" standard for defining "putative defendants" is both inappropriate in fact and likely to be destructive of the effective functioning of the grand jury.

the incidence of perjury by police officers during suppression hearings, we think there is minimal risk that government attorneys, given their special responsibilities in the administration of the criminal justice system and their status as officers of the court, would testify falsely. While such an occurrence is not impossible, the risk is surely sufficiently slight that it is unjustified to adopt an otherwise undesirable rule of law solely to avoid it. In short, the subjective standard, applied after full opportunity for cross-examination and without impairment of the right of the judge to assess credibility, is both viable and appropriate if the "putative defendant" concept is to be prescribed by the courts as a standard for defining the obligations of government attorneys in conducting grand juries.

III. THE GOVERNMENT'S FAILURE TO GIVE ADEQUATE WARNINGS SHOULD NOT RESULT IN THE SUPPRESSION OF TESTIMONY IN A SUBSEQUENT PROSECUTION FOR PERJURY

Even if the court of appeals were correct in its determination that the government violated respondent's privilege against compulsory self-incrimination by failing to give him complete *Miranda* warnings prior to his testimony, the court's remedy—suppression of respondent's testimony in a subsequent prosecution for perjury—is unwarranted by policy or precedent.[18]

---

[18] Virtually every other court that has considered the issue has concluded that even if putative defendants are entitled to some *Miranda* warnings, failure to give the warnings does not license them to commit perjury. See, *e.g.*, *United States* v. *Win-*

1. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States,* 222 U.S. 139, 142. See also *Harris* v. *New York,* 401 U.S. 222, 225; *Bryson* v. *United States,* 396 U.S. 64, 72. A witness may properly resist efforts to compel him to incriminate himself (see, *e.g., Lefkowitz* v. *Turley,* 414 U.S. 70, 78), and if he submits to such efforts, his incriminating statements may be excludable from future substantive use by the prosecution (*id.* at 79–80; *Maness* v. *Meyers, supra,* opinion of Mr. Justice White). But he may not avoid compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson, supra,* 396 U.S. at 72.

United States v. *Knox,* 396 U.S. 77, demonstrates the applicability of this proposition to the instant case. There, the defendant had been charged with making false statements in wagering tax forms

---

ter, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7) certiorari denied, 355 U.S. 836; *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels*, 502 F. 2d 1173 (C.A. 7); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied, 389 U.S. 1041; *United States* v. *Pommerening*, 500 F. 2d 92 (C.A. 10), certiorari denied, 419 U.S. 1088, stay granted, January 16, 1975; see also *United States ex rel. Annunziato* v. *Deegan*, 440 F. 2d 304, 306 (C.A. 2); *United States* v. *Pacente*, 490 F. 2d 661 (C.A. 7), rehearing *en banc*, 503 F. 2d 543, certiorari denied, 419 U.S. 1048; but see *United States* v. *Wong, supra.*

required by a statute declared unconstitutional in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. The district court dismissed the indictment, reasoning that the defendant could not be prosecuted for failure to answer the wagering form truthfully because the Fifth Amendment privilege would have prevented his prosecution for failure to answer the form's questions in the first place.

While this Court agreed that the statute in question "injected an element of pressure into [the defendant's] predicament at the time he filed the forms" (396 U.S. at 82), it held that the defendant's perjury was nevertheless not excusable on Fifth Amendment grounds. The Court reasoned that in making the false statements the defendant took "a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take * * *" (*ibid.*). Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "[W]hen [he] responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion" (*ibid.*).

The same reasoning would apply even more forcefully to the instant case. If it is impermissible to lie to the government in the face of the degree of palpable, overt compulsion that confronted Knox, it is manifestly impermissible to answer falsely when, as here, the respondent has every reason to believe that the priv-

ilege is fully available.[19] Indeed, respondent was expressly warned prior to testifying that "[y]ou don't have to answer questions which would incriminate you."

2. The court of appeals nevertheless found the principle enunciated in the *Glickstein-Bryson-Knox* line of cases[20] inapplicable to a "putative defendant" who, without prior benefit of *Miranda* warnings, lies to the grand jury. Evidently recognizing that suppression of such false testimony could not be justified by reference to the self-incrimination provision of the Fifth Amendment, it sought to rest its conclusion on a characterization of the government's conduct in bringing respondent before the grand jury without providing full *Miranda* warnings as being "beyond the *pale of permissible prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment" (Pet. App. A, p. 19A; emphasis in original). This was because the court felt that the respondent was being confronted with a "Hobson's choice" (Pet. App. A, p. 15A) between self-incrimination and perjury, and "the attorney's questioning was primarily baiting Mandujano to commit perjury" (*id.* at 11A).

There are, it seems to us, numerous difficulties with the court of appeals' effort to support its holding on

[19] At the time Knox filed his wagering tax form, this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, apparently validated the compulsory requirement of filing such forms.

[20] The decision cites (Pet. App. A, p. 18A) *Glickstein* but makes no reference to *Knox* or *Bryson*.

this "due process" rationale. To begin with, it is difficult to see how it was more unfair to ask respondent questions before the grand jury than it was to require Knox to file a wagering tax form confessing involvment in criminal activities; indeed, unlike Knox, respondent had the unchallenged right to decline to give incriminating answers. Secondly, the "Hobson's choice" discerned by the court of appeals, while reminiscent of the "cruel trilemma of self-accusation, perjury or contempt" decried in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, is critically different in that respondent had (and was told he had) the right simply to refuse to answer questions encroaching on areas of potential self-incrimination. Cf. *Michigan* v. *Tucker, supra*, 417 U.S. at 445.

In seeking to peg its decision on due process grounds, the court of appeals also entirely overlooked the long line of decisions of this Court prior to *Miranda* evaluating the voluntariness and admissibility of statements obtained by interrogation of persons suspected of criminal offenses. The governing criterion in such inquiries was whether the defendant was subject to physical or psychological coercion of such a degree that his "will was overborne at the time" the statements in issue were made. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503, 513; *Lynumn* v. *Illinois*, 372 U.S. 528, 534. Thus, even where a defendant was subjected to incommunicado police interrogation for over twelve hours, during the last seven of which requests by his family and attorney to speak with him were refused by the police, there was no deprivation of due process.

Cicenia v. *Lagay*, 357 U.S. 504.[21] Certainly the interrogation of respondent before the grand jury in the present case was not as coercive as that of *Cicenia*, let alone resembling the kind of interrogative tactics, such as physical abuse (*Brown* v. *Mississippi*, 297 U.S. 278), prolonged isolation from family or friends in a hostile setting (*Gallegos* v. *Colorado*, 370 U.S. 49), or extended and exhausting interrogation (*Watts* v. *Indiana*, 338 U.S. 49), that this Court has considered to violate due process requirements.

These considerations aside, we urge this Court to reject the underlying premise of the court of appeals' decision—that it is inherently unfair to call as grand jury witnesses individuals known or suspected by the government to have some involvement in the kinds of criminal activity under investigation by the grand jury. Common sense tells us that the court was on shaky ground in positing malign motives in the decision to call respondent before the grand jury and question him in the fashion that he was questioned. As the special attorney testified (see pp. 42–43 and n. 16, *supra*), the government had a far more plausible motive for summoning respondent than to "entrap" him into self-incrimination or perjury. Respondent had offered to procure heroin from his sources for sale to the undercover agent, from which it was manifestly reasonable to conclude that respondent could supply the grand jury with names of his sources for heroin, thereby immeasurably aiding the grand jury in its efforts to identify persons involved in distribution of the illicit drug in the district.

[21] While the holding in *Cicenia* was arguably inconsistent with that in *Escobedo*, the latter decision was predicated on Sixth Amendment rather than due process grounds. The *Escobedo* rationale was in turn abandoned in favor of a self-incrimination analysis in *Miranda*.

If the grand jury is to have any realistic hope of succeeding in the mission of ferreting out unreported crime and corruption, it is critically dependent on the ability to obtain information from witnesses such as respondent, who, by virtue of their involvement in or at the fringes of the activities under investigation, are most likely to possess the kind of information that is indispensable to a successful inquiry. And even when a witness is a prime target, he may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury. See *United States* v *Winter*, *supra*. "Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry." *United States* v. *Sweig*, 441 F. 2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932.

As the Second Circuit recently said in *United States* v. *Del Toro and Kaufman*, Nos. 74–2021, 74–2035, decided February 27, 1975 (slip op., p. 1973): "It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth." So long as the witness's will has not been overborne by threats, trickery, or other forms of actual coercion, the privilege against self-incrimination has not been offended, and due process of law has been accorded.

incriminate him—that he must tell the truth, and that if he lied he could be prosecuted for perjury (App. 5–6).

Nor is there any basis for concluding that the conduct of the government agents in calling respondent to testify before the grand jury about heroin trafficking was "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, cf. *Rochin* v. *California," United States* v. *Russell, supra,* 411 U.S. at 431–432. In obtaining respondent's perjured statements, the government neither subjected respondent to any hardship nor violated any of his fundamental rights. Nor did it deceive him, or in any way participate in an unlawful practice. Cf. *Lewis* v. *United States,* 385 U.S. 206. Its tactic, designed primarily to aid the grand jury in ascertaining whether a crime had been committed and if so by whom, can hardly be said to violate "fundamental fairness" or be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246) because it incidentally forced respondent to choose between entirely legitimate alternatives—asserting his privilege or truthfully recounting his knowledge of drug trafficking activities. That respondent chose instead to adopt the wholly illegitimate alternative of committing perjury cannot be attributed to any action that the government took or failed to take. See *United States* v. *Nickels, supra; United States* v. *Fiorillo,* 376 F. 2d 180, 184 (C.A. 2);

3. Apparently being of the view that the only sensible thing for respondent to have done when called before the grand jury was to invoke his privilege and refuse to answer questions, and that it was seriously improper for the government attorney to hope that respondent would voluntarily supply truthful information to the grand jury, both the district court (Pet. App. D, p. 30A) and the court of appeals (Pet. App. A, p. 11A) opined that the action of the attorney "smacks of entrapment." The court of appeals did not indicate whether it was in fact holding that respondent had been entrapped; but a holding that a "putative defendant" who lies to a grand jury has been entrapped into committing perjury (either by the bare fact that he was called to testify or by the failure to give *Miranda* warnings) cannot be reconciled with the concept of entrapment as it has been articulated by this Court.

Entrapment exists only when government officials "implant in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells* v. *United States,* 287 U.S. 435, 442; *United States* v. *Russell,* 411 U.S. 423, 436. Here, however, there was no evidence that the government implanted in respondent's mind the design to commit perjury or in any way thwarted whatever predisposition to tell the truth he might have had. Indeed, at the outset of respondent's appearance before the grand jury he was expressly warned—in addition to being told that he need not answer questions which would tend to

United States v. *Lazaros*, 480 F. 2d 174 (C.A. 6), certiorari denied, 415 U.S. 914.[22]

4. Finally, even if this Court concludes that questioning of "putative defendants" without full *Miranda* warnings is an improper procedure, it is unnecessary to adopt an exclusionary rule to assure compliance with the proper procedure. Unlike the Fourth Amendment exclusionary rule, which is deemed necessary because there is considered to be no other practical means of correcting and forestalling police behavior in violation of the rights protected by that provision, an exclusionary principle in this context would be addressed to regulation of the conduct of government attorneys. There is no reason to suppose that there would be any significant incidence of disobedience by such attorneys to a requirement to administer warnings to witnesses; accordingly, the drastic remedy of exclusion of relevant evidence in criminal cases is not warranted here.

[22] The government's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness before a tribunal, or summoning a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed solely to maximize the opportunity for perjury. See *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo.); *United States* v. *Cross*, 170 F. Supp. 303 (D. D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio); see also *LaRocca* v. *United States*, 337 F. 2d 39, 43 (C.A. 8).

Even assuming that an exclusionary rule were considered necessary for failures to warn, the deterrent purposes of such a rule would be amply served by providing for exclusion of the testimony from use in a trial of the substantive offense (here, attempted heroin distribution). There would be little or no marginal deterrent effect from the radical measure of suppression in a perjury prosecution. See *United States* v. *Calandra, supra,* 414 U.S. at 348.

Finally, with regard to the propriety of the sanction of suppression in the present case, we note that there is no reason to believe that any deficiency in the warnings actually administered was deliberate. At the time of respondent's grand jury appearance, no court had yet required that *Miranda* warnings be administered to "putative defendants" prior to their testifying before a grand jury. Indeed, only one circuit had then intimated that a "putative defendant" would be entitled to warnings of any kind. *United States* v. *Luxenberg, supra.*[23] As this Court recently noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes * * * willful, or at the very least negligent, conduct * * *. Where the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force." *Michigan* v. *Tucker, supra,* 417 U.S. at 447. Suppression of the allegedly perjurious testimony was an inappropriate remedy in this case.

[23] Moreover, it appears that the warning administered to respondent would have satisfied the *Luxenberg* dictum. See n. 8, *supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
ROBERT B. REICH,
Assistant to the Solicitor General.
SHIRLEY BACCUS-LOBEL,
JAMES A. HUNOLT,
Attorneys.

JUNE 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-754

UNITED STATES OF AMERICA,
Petitioner,

v.

ROY MANDUJANO
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

MICHAEL ALLEN PETERS
1217 Calhoun
Houston, Texas 77002
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	13
I. A GRAND JURY SETTING IS INHERENTLY COERCIVE AS IT IS A PART OF THE INVESTIGATING PROCESS AND INTELLIGENCE SYSTEM OF THE GOVERNMENT	13
II. MANDUJANO WAS A "PUTATIVE DEFENDANT" PRIOR TO HIS APPEARANCE BEFORE THE GRAND JURY OR DURING THE QUESTIONING BEFORE THE GRAND JURY WHEN THE QUESTIONING BECAME SPECIFIC AS TO KNOWN PRIOR ACTS OF MISCONDUCT	23
III. THAT MANDUJANO AS A "PUTATIVE DEFENDANT" MUST BE AFFORDED MIRANDA WARNINGS	30
IV. CAN A "PUTATIVE DEFENDANT" WHO IS NOT GIVEN MIRANDA WARNINGS, COMMIT PERJURY WITH IMPUNITY?	34
CONCLUSION	38
AFFIDAVIT OF SERVICE	39

TABLE OF AUTHORITIES

Cases:

Betts v. Brady, 316 U.S. 455	12, 37
Brown v. Mississippi, 297 U.S. 278	36
Brown v. Walker, 161 U.S. 591	30

	Page
Bryson v. United States, 396 U.S. 64	34
Bumper v. State of North Carolina, 88 S.Ct. 1788	22
Cicenia v. Lagay, 357 U.S. 504	36
Counselman v. Hitchcock, 142 U.S. 547 (1892)	30
Escobedo v. Illinois, 378 U.S. 478 (1964)	30
Gallegos v. Colorado, 370 U.S. 49	36
Glickstein v. United States, 222 U.S. 139	34
Halt v. Henkel, 201 U.S. 43	30
Harris v. New York, 401 U.S. 222	34
Hoffman v. United States, 341 U.S. 479	30
In Re Groban, 352 U.S. 330, 346-347	15
In Re Kelly, 350 F.Supp. 1198	29
Johnson v. Zerbst, 304 U.S. 458	18
Kastigan v. United States, 406 U.S. 441 (1972)	30
Kinsella v. United States, 361 U.S. 234	37
Kirby v. Illinois, 406 U.S. 682, 689	21
Lawn v. United States, 115 F.Supp. 674	32
Lefkowitz v. Turley, 414 U.S. 70	30
Mattox v. Carson, 424 F.2d 202	16
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Murphy v. Waterfront Commission, 378 U.S. 52	32, 35
Rogers v. United States, 340 U.S. 367	30-31
Schneckloth v. Bustamonte, 412 U.S. 218, 226-227	16, 35, 38
United States v. Calandra, 414 U.S. 338, 343	15
United States v. Digrazia, 213 F.Supp. 232	32
United States v. Fruchtman, 202 F.Supp. 534, 536	25, 32
United States v. Jones, 342 F.2d 863	31
United States v. Knox, 396 U.S. 77	35

	Page
United States v. Lardieri, 497 F.2d 317	25
United States v. Luxenberg, 374 F.2d 241	32
United States v. Mandujano, 499 F.2d 370 (C.A. 5 1974, Certiorari Denied, S.Ct. No. 74-5441, January 13, 1975)	27
United States v. Monia, 317 U.S. 424 (1943)	30
United States v. Murdock, 284 U.S. 141, 148	30
United States v. Phillips, 443 F.2d 246 (C.A. 5)	13
United States v. Rangel, 496 F.2d 1059	31, 32
Watts v. Indiana, 338 U.S. 49	36
Miscellaneous, Constitution, Statutes:	
Constitution of the United States:	
Fourth Amendment	
Fifth Amendment	*passim*
Sixth Amendment	2
18 U.S.C. 1623	2
American Bar Association Project on Standards Relating to the Prosecution Function, Approved Draft 1971, Section 3.6 (d), p. 32	32-33
Katz: Criminal Procedure – Grand Juries – Lack of Miranda Warnings for Virtual Defendant Results in Suppression of Perjurious Testimony, Vol. 53, No. 1, *Texas Law Review* (1974)	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-754

UNITED STATES OF AMERICA,
Petitioner,

v.

ROY MANDUJANO
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a grand jury setting is inherently coercive.

2. Whether a "putative defendant" must be given *Miranda* warnings prior to his testimony before a grand jury when the interrogation focuses on specific acts of misconduct, which acts the government has investigated.

3. Whether a "putative defendant" who is not given *Miranda* warnings can commit perjury with impunity.

4. Whether suppression of the alleged perjurious grand jury testimony is the proper remedy when the witness has been denied "due process."

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person – shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law–.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

2. 18 U.S.C. provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration – shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. On the 29th day of March, 1973, Alfonso Cavalier, an officer with the San Antonio, Texas, Police Department assigned to the Office of Drug Abuse Law

Enforcement (App. 47), went to the Tally-Ho Lounge that was owned by respondent (App. 48). Agent Cavalier went there at approximately 1:30 in the afternoon on March 29, 1973, for the purpose of possibly making a buy of heroin from respondent (App. 48). After being with respondent some two hours, respondent allegedly made several phone calls trying to contact someone who had heroin (App. 49-50). After being unable to contact anyone, respondent allegedly requested Cavalier to give him $650 to purchase the heroin (App. 49). Respondent allegedly took the $650 and left the Tally-Ho Lounge about 3:25 P.M. (App. 49) and returned around 4:30 P.M. on that same day (App. 49). Cavalier then said that Mandujano was unable to contact the contact man to secure any heroin and returned the money to him (App. 49). Cavalier then left the bar and then aborted the entire operation later that day. Some seventy-seven days later, Agent Cavalier prepared a written report as he was informed that the government was going to try and charge Mandujano with perjury before the grand jury and they wanted some facts on the actual case (App. 51). The report that Cavalier prepared was signed June 4, 1973. Thus, some four months passed between the date of the alleged attempt of distribution of one ounce of heroin to the signing of the report.

Cavalier allegedly informed the special prosecutor, Luckel, that Mandujano had quite a bit of intelligence about narcotic traffic and trafficking in San Antonio, Texas (App. 52). The prosecutor then believed that Mandujano had several potential sources allegedly whom Mandujano could contact to obtain heroin (App. 45). Thus, the special prosecutor subpoenaed Mandujano to

appear before the grand jury, and the purpose of asking him the questions to which the prosecutor knew the answers was to gauge the truthfulness of Mandujano's testimony (App. 45).

2. Mandujano was compelled by subpoena to appear before the grand jury on May 2, 1973 (App. 2). Mandujano had received the subpoena about a week before he was forced to appear. The special prosecutor, Luckel, told Mandujano that he was a special attorney employed by the Department of Justice and the other people present were members of a special federal grand jury investigating violations of narcotics and firearms (App. 5). In this setting which the prosecutor placed out of perspective, Mandujano was told the following:

> "Q. Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> "A. Do I answer all the questions you ask?
>
> "Q. You have to answer all the questions except for those you feel will incriminate you in the commission of a crime. Is that clear?
>
> "A. Yes, sir.
>
> "Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer truthfully, in other words, if you lie about certain questions you could possibly be charged with perjury. Do you understand that?
>
> "A. Yes, sir.
>
> "Q. Have you contacted a lawyer in this matter?
>
> "A. No, sir, I haven't.

> "Q. I take that to mean then that you do not wish the services of a lawyer here today?
>
> "A. I don't have one. I don't have the money to get one.
>
> "Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside . . . (App. 5-6)"

After the special prosecutor administered the above to Mandujano, the prosecutor then asked background information of Mandujano. Then the prosecutor asked specifically of Mandujano whether he had discussed the sale of heroin with anyone during the past year and if anyone had ever asked to buy one ounce from him (App. 15-16). Mandujano denied it (App. 16). The prosecutor asked, "Are you sure of that?" To which Mandujano replied, "Yes." (App. 16). The prosecutor later asked Mandujano whether he was sure whether Mandujano discussed selling heroin last year to which Mandujano said, "No." (App. 20). The prosecutor asked Mandujano whether he was ever given any money to buy heroin and if he had $650 could Mandujano buy one ounce of heroin, to which Mandujano said, "No." (App. 20). The prosecutor stated that the only reason he had asked these questions to which he knew the answers and which were based upon the substantive crime, was to gauge the truthfulness of Mandujano's testimony (App. 45-46). The prosecutor asked about others who sell or were involved in narcotics (App. 18-19) and about possession of a gun (App. 21). Nowhere else is there a discussion about what the grand jury was convened to investigate (App. 5).

3. The special prosecutor then indicted Mandujano on June 13, 1973, on two counts: Count One,

attempted distribution of one ounce of heroin in violation of 21 U.S.C. 846(a) (App. 36); and Count Two, perjury in violation of 18 U.S.C. 1623 (App. 2-4). But before Mandujano was indicted, the special prosecutor had Agent Cavalier, the only government witness, prepare a written statement which was prepared on June 4, 1973 (App. 51).

4. Prior to trial, Mandujano moved to suppress his grand jury testimony (App. 23-25). After evidentiary hearings, the district court granted the motion to suppress, holding that Mandujano was a "putative defendant" when he appeared before the grand jury and that he was entitled to full *Miranda* warnings prior to testifying (Pet. App. D, pp. 36A-38A). The district court noted that although a grand jury subpoena is not inherently coercive, Mandujano was under an apparent compulsion to testify (Pet. App. D, p. 40A).

The Fifth Circuit Court of Appeals affirmed, adopting the holding of the district court (Pet. App. A, pp. 5A-6A, 12A). The Court of Appeals held that when Mandujano appeared before the grand jury the government had focused on him as a person whom the government knew had committed a crime and that the government intended to indict (Pet. App. A, p. 7A). The Court of Appeals found that the warnings given to Mandujano were inadequate (Pet. App. D, p. 30A). The court concluded that the entire proceedings violated Mandujano's due process rights under the Fifth Amendment (Pet. App. A, p. 19A) and were fundamentally unfair and that the remedy was suppression of the allegedly perjurious testimony. The government petitioned the Fifth Circuit Court of Appeals en banc and was denied unanimously.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is based upon the conclusions that: (1) the grand jury setting is inherently coercive and that a subpoena is coercive; albeit colorably lawful coercion, there is still compulsion; (2) That "putative defendants" must be given *Miranda* warnings either before testifying before a grand jury or at the instant the government asks specific questions of the witness, the answers to which the government already knows; and (3) That Mandujano was a "putative defendant" and that his testimony was properly suppressed. Our position is that the courts' decisions below are correct and we urge an affirmation of the holdings below.

1. A grand jury setting is coercive when one is forced to appear by subpoena. The subpoena itself may or may not be the coercive measure, but that considered with the grand jury makeup and the deprivation of one's normal freedoms act as an inherently coercive atmosphere. One does not have to be in unfamiliar surroundings nor does one have to be at a police station for coercion to exist. Coercion exists in many guises and can be physical and non-physical. The coercion of the police station that *Miranda* focused on is "functionally equivalent" to that of a grand jury setting. *Miranda* indicates that one does not have to be interrogated "in private" for coercion to exist. Consider that Mandujano was a tenth grade educated, ignorant Mexican who was emotionally and mentally "tricked and persuaded" by the special prosecutor. Mandujano was not an ordinary witness when he appeared before the inquisition and he was stripped of his Constitutional

rights by the cleverness of the prosecutor. Merely because Mandujano did not claim the privilege does not mean he was not compelled within the meaning of the Fifth Amendment.

Mandujano clearly did not knowingly waive any of his rights as the so-called warnings were so inadequate and confusing that Mandujano himself did not understand what the prosecutor was stating and therefore there was no relinquishment of any kind. The appearance of Mandujano was to place him in a compelling atmosphere in which he was deprived of his freedom and rights and thereby place him in a custodial atmosphere.

2. *Miranda* applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the Fifth Amendment right against compulsory self-incrimination. After the *Miranda* warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive those rights. When a person who is not under investigation is compelled to appear before the government's agent, the grand jury, then there is no requirement to administer *Miranda* warnings and thus there is no impairment of the grand jury's effectiveness. Furthermore, not every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant" nor are *Miranda* warnings required. The turning point is when the grand jury focuses, as they did on Mandujano, upon specific acts, at which time the grand jury should and indeed must advise the witness of his *Miranda* warnings and then the grand jury must afford the

individual the opportunity to exercise those rights so that an individual can knowingly and intelligently waive those rights.

Mandujano, with his tenth grade education, obviously did not knowingly and intelligently waive his rights, let alone understand them as is illustrated by the following questions asked by the grand jury prosecutor:

> "You are required to answer all the questions that I ask you except for the ones that would tend to incriminate you."

To which Mandujano replied:

> "Do I answer all the questions you ask?" (App. 5)

The same special prosecutor asked Mandujano in the same grand jury setting, "I take that to mean you do not wish the services of a lawyer here today?" To which Mandujano replied that he had talked to an attorney and that he could not afford one. (App. 6). This response caused the special prosecutor to state to Mandujano that the lawyer could not be inside the grand jury room but only outside.

Thus, the special prosecutor implied to Mandujano that it would do him no good to have an attorney with him anyway. Furthermore, it is very apparent that Mandujano did not understand the questions as to self-incrimination clearly, otherwise, why did Mandujano respond, "Do I answer all the questions you ask?"

Then the special prosecutor stated to Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer those truthfully, in other words, if you lie about

certain questions, you could possibly be charged with perjury. Do you understand that?" To which Mandujano replied, "Yes, sir." (App. 6). In light of Mandujano's already apparent lack of understanding from the previous question regarding incrimination, the question posed by the special prosecutor was not only long, but was couched in terms of ambiguity, so much so that the special prosecutor himself in the midst of his question had to rephrase what he thought as is exemplified by the interjection of "in other words".

Further, the word "possibly" created ambiguity and confusion to Mandujano because of the way in which it was used. The special prosecutor stated, " . . . You could 'possibly' be charged with perjury . . . ", which gives an ambiguous meaning that a wrong answer or a false utterance is not perjurious but might be. Because the "warning" given was confusing, not understood, and ambiguous, plus the possible threat that was involved to Mandujano, there is raised the question as to whether Mandujano may have been compelled in some significant way to testify by the form of the warning or deterred by it from invoking his privilege.

Further, the government continually presents the question phrased in many guises but limited to a question not raised by the Fifth Circuit's holding. The question asked by the government is whether a grand jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination. The proper question should be: whether a "putative" defendant (someone not just suspected) who is compelled to appear before a grand jury must be advised of his Fifth Amendment right as well as to be advised of his *Miranda* warnings?

Mandujano was not merely suspected of participating in a substantive offense, he was already allegedly known to have done so as the government's Dale agents had informed the special prosecutor. The prosecutor states that "he did not consider the transaction to have been an indictable offense" (App. 42). The prosecutor stated that he did not intend to seek an indictment against Mandujano at that time (App. 42). The only intent on the part of the prosecutor was to ask the specific details surrounding the incident on March 29, 1973.

The government contends that there are additional related issues as to whether the "putative defendant" concept is to be deferred by reference to subjective criteria reflecting the prosecutor intent of government attorneys or objective criteria that consider whether the government possesses incriminating evidence against the witness at the time he is called to testify. *Miranda* answers the government's inquiry as to whether subjective criteria or objective criteria determines the status of a witness to be either an ordinary grand jury witness or that of a putative defendant. The test is whether the investigation was specific, focused on a specific violation of the law, and focused specifically upon the individual as the violator, an individual who is the focus of the investigation thereby removes himself from the role of an ordinary grand jury witness to that of the "putative defendant" who requires special warnings to be given before further questioning. What is to prevent the grand jury from subpoenaing and compelling everyone who was ultimately to be indicted to appear and testify about those specific matters about which he is ultimately indicted. Consider also the hypothetical regarding the case of a defendant, already

indicted, who is compelled by subpoena to appear before a grand jury. Is this individual entitled to any type of *Miranda* warning? Fifth Amendment advisement? Thus, Mandujano is clearly a "putative defendant" entitled to *Miranda* warnings.

3. As to the crucial point dealing with committing perjury with impunity, as would seem to be the end result of affirming the district court and court of appeals, there comes the question as to whether an agent of the prosecution, be it the grand jury or police, can compel a "putative defendant" to appear and testify against his Fifth Amendment right. Where a totally unfair procedure is used, such as that which occurred when Mandujano was compelled to appear before the government's tool, the grand jury, elemental fairness requires that the "putative defendant" be advised of his *Miranda* warnings and that failure to do so will result in suppressing the grand jury testimony. Consider the same result if the police fail to advise an accused before a confession is obtained. The test as stated by the courts below was based on *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942) which stated that: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial." We contend that Mandujano was denied due process through the blatant misuse of the grand jury process.

ARGUMENT

The decision of the court of appeals is based upon the conclusions that: (1) a grand jury setting is coercive which compelled and overwhelmed the will of Mandujano; (2) that "putative defendants" must be given *Miranda* warnings either before testifying before a grand jury or at the instant the government asks specific questions of the witness, the answers to which the government already knows because they have already investigated the witness; and (3) that Mandujano was a "putative defendant" whose testimony was properly suppressed. We contend that the courts below were correct in each of their conclusions and affirmation of the decision must follow.

I.

A GRAND JURY SETTING IS INHERENTLY COERCIVE AS IT IS A PART OF THE INVESTIGATING PROCESS AND INTELLIGENCE SYSTEM OF THE GOVERNMENT.

A grand jury setting is inherently coercive, although in each and every instance, it may not be depending upon all the factors surrounding the grand jury, e.g., persons comprising grand jury, prosecutor, witnesses subpoenaed to appear, scope and purpose of investigation. In *United States v. Philips*, 443 F.2d 246, the Court stated that merely because questioning takes place in familiar surroundings rather than at a police station does not mean that a person is not being

subjected to custodial interrogation or is in an inherently coercive posture.

The grand jury in the case before the Court indicted Roy Mandujano on two counts. Count Two of the indictment alleges that: "... 2. That, at the time and place aforesaid, the grand jury, inquiring as aforesaid, was conducting an investigation to determine whether there were violations of the narcotics, internal revenue, or firearms laws of the United States. ..." (App. 2-3). There was only one time that the grand jury questioned Mandujano about persons from whom he had bought heroin (App. 17) and further, at the close of the interrogation there was discussion of a gun (App. 21-22). Nowhere else does the scope of the inquiry coincide with the purpose of what the grand jury's original setting was intended to investigate. Rather, the grand jury sat moot while the special prosecutor, E. Luckel, conducted his coercive questioning of Mandujano. The special prosecutor Luckel was not trying to determine whether there was any useful information to be had from Mandujano's appearance in the grand jury as was evident from the scope and focus of Luckel's questions.

Mandujano appeared pursuant to a subpoena before what was intended to be a peoples' panel designed to protect the innocent from unwarranted prosecution; but instead, Mandujano appeared before the special prosecutor and grant jury members alone and without the presence of counsel. Mandujano was not permitted to ask questions nor could he take notes and thus was at the mercy of the special prosecutor.

The Fifth Amendment and grand jury were designed to protect persons against arbitrary and oppressive

governmental action. *United States v. Calandra*, 414 U.S. 338, 343. Consider what was perpetrated upon Mandujano. He was compelled by way of a subpoena (App. 5), asked questions, the answers to which the special prosecutor already knew (App. 38, 39, 40, 44) for the exclusive purpose of trapping an ignorant, tenth grade educated, Spanish-speaking Mexican, to either invoke his Fifth Amendment right, or to answer the questions truthfully and face subsequent indictment on the case in chief (and, in effect, be forced to abandon one's right to testify on Count One of the indictment), or to refuse to answer and face contempt charges, or to knowingly answer the questions falsely and face perjury charges. This is what the special prosecutor's options were that he could force upon Mandujano and the ignorance of Mandujano was used like a club in the hands of the special prosecutor.

The government in its brief (p. 24) cites *In Re Groban*, 352 U.S. 330, standing for the proposition that the grand jury is not a secret proceeding nor is it coercive because they have a viewpoint from all sections of the community and do not have any axes to grind. The government, with emphasis supplied, citing from *In Re Groban, supra*, stated, "It would be very difficult for officers of the State seriously to abuse or deceive a witness in the presence of the grand jury". Consider the occasion wherein Mandujano was already investigated, was subpoenaed to appear before the grand jury and forced, coerced by the special prosecutor, to answer questions to which the prosecutor already knew the answers. The grand jury did not know that there was an investigation already done on Mandujano. Consider that the prosecutor need not present any evidence or

testimony that is exculpatory for Mandujano. Consider that subpoenas can be issued for irrelevant purposes which only conceal the true purpose of an investigation. Consider that the prosecutor does not have to inform the grand jury what an investigation is about or why he wants a particular witness questioned. The government in its brief (p. 24) states that a transcript is made of the proceedings – but consider, that if a prosecutor makes a false or prejudicial statement to the grand jury while a witness or "suspect" is absent, the statement can be stricken and it will not necessarily show up in the final record. *CF. Mattox v. Carson,* 424 F.2d 202.

The court in *Schneckloth v. Bustamonte*, said, "In determining whether a defendant's will was overborne in a particular case, the court has assessed the totality of all the surrounding circumstances. . . ." 412 U.S. 218, 226-227. After considering all the circumstances this court must conclude in this case that there was an overwhelming compulsion over Mandujano's will which virtually stripped him of any rights.

The government attempts to distinguish questioning that occurs at a police station and questioning that occurs before a grand jury. The government, in its brief (p. 23), states that the court in *Miranda* was concerned about the danger of compulsion during police interrogation which was probable due to the principal fact that the interrogation occurs in private. 384 U.S. at 449. Privacy is "essential to prevent distraction and to deprive (a suspect) of any outside support" (id. at 455). The police may then "persuade, trick, or cajole (the suspect) out of exercising his constitutional rights" (Ibid). Our position is that what happened to Mandujano indicates that one does not have to be

interrogated in "private" in order to be coerced. Mandujano was without benefit of any outside support and was forced to appear before "fellow citizens" of his community. The prosecutor did not physically "persuade, trick, or cajole" Mandujano, but emotionally and mentally the prosecutor did "persuade, trick, or cajole" him. *Miranda* was never intended to create "a constitutional straight jacket" (*Miranda, Supra*, 384 U.S. at 467) to be applied to every form of official questioning. However, the words of the court in its holding do not limit *Miranda* to merely police questioning nor does the language exclude its applicability to grand jury proceedings (id. at 477-478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

The court permits "general, on-the-scene questioning" – the court does not permit questioning which is specific and which questioning is based on known answers. Furthermore, the court did not contemplate the situation of a person under oath. The most important aspect from the above quotation is that "in such situations the compelling atmosphere inherent in the process of in-custody interrogation is not 'necessarily' present." Not necessarily present, but could be present – just as what occurred when Mandujano appeared before the grand jury.

The police can interrogate an individual be he a suspect or otherwise; but when the focus of the investigation excludes all other candidates as the perpetrator of the crime, the police must render the *Miranda* warnings. *Miranda* applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the individual's Fifth Amendment right against compulsory self-incrimination. After *Miranda* warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive the rights. *Johnson v. Zerbst,* 304 U.S. 438.

Mandujano obviously did not knowingly and intelligently waive any of his rights as explained by the special prosecutor Luckel nor did Mandujano understand them as is illustrated by the excerpts from the grand jury testimony: (All questions propounded by Eb Luckel, the special prosecutor, and the answers given by Mandujano).

"Q. . . . You are here today because you have been served with a subpoena. When did you get that subpoena?

"A. Sir?

"Q. When did you receive the subpoena, the piece of paper that told you to be here?

"A. Oh, I think last week.

"Q. Early in the week?

"A. Last week, Yes, Sir . . . (App. 5)

x
x
x

"Q. . . . Now, you are *required* to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

"A. Do I answer all the questions you ask? (App. 5)

x
x
x

"Q. . . . First, of all, Sir, where do you reside now?

"A. Well, I'm living with my uncle.

"Q. Where?

"A. With my uncle. (App. 6)

x
x
x

"Q. And where is that place?

"A. On Guadalupe Street.

"Q. What address, please?

"A. 2217 Guadalupe.

"Q. 2270?

"A. Yes, Sir. (App. 7 and 8)

x
x
x

"Q. Is he (Respondent's father) in the business of repairing refrigerators?

"A. No, Sir. He buys refrigerators from houses, you know, and we fix them and sell them. (App. 9)

x
x
x

"Q. Is it safe to say that you don't make over $60?

"A. No, not more than that.

"Q. You never make more than $60 a week?

"A. Yes, Sir. (App. 10).

x
x
x

"Q. Okay. And do you presently use heroin yourself?

"A. No, Sir. I'm not using anymore . . .

"Q. How long has it been since you shot up heroin?

"A. About three months or four months . . .

"Q. In other words, you haven't shot up in 1973?

"A. No, Sir, I have . . .

"Q. How recently?

"A. About one time a week. (App. 13).

"Q. Do you have a gun by any chance?

"A. No, Sir.

"Q. You don't own a gun?

"A. I own one, Yes, Sir. (App. 21)

The Court has always set rigid standards for proof of a knowing and voluntarily given waiver of one's Constitutional rights and the burden of showing this rests with the government, *Miranda v. Arizona*, 384 U.S. at 475.

The Court in *Miranda*, 384 U.S. at 468, made it clear that an adequate warning is a prerequisite to a finding of an intelligent waiver.

For those unaware of the privilege, the warning is needed to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogation's implications, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

Mandujano was compelled to appear in a strange environment, before a body of some 23 persons, under the auspices of a highly trained and skilled special prosecutor, who asked Mandujano questions which were ambiguous and confusing and not understood as is exhibited by the foregoing excerpts from the grand jury testimony.

The Court in *Kirby v. Illinois*, 406 U.S. 682, 689, stated the test to determine custody must be an objective one. The government states that something more than official interrogation must be shown (Petitioner's Brief, p. 31). In the case before the Court, there is more than just official interrogation: a quasi-defendant subpoenaed to appear before the grand jury and questioned specifically about those very acts which formed the basis of a subsequent indictment. Furthermore, the government states that the "government's mere knowledge or intention with regard to a particular individual, unaccompanied by any action or

procedure that treats him differently from other individuals with whom the government deals does not itself initiate criminal proceedings or result in 'custody' " (Petitioner's Brief, p. 31). The government has pointed out the general rule which does not apply to "virtual" or "putative" defendants or to "suspects"—before this Court there is a particular individual, Roy Mandujano, who was treated differently from all other individuals with whom the government normally deals with and it is exactly this difference which places him in a category outside the scope of the ordinary grand jury witness. When the interrogation of Mandujano became specific, and focused on a specific violation of the law, and focused specifically upon Mandujano as the violator, then the individual, who is the focus of the investigation and interrogation removes himself from the ordinary role of a grand jury witness to that of a virtual or putative defendant. Thus, a grand jury setting is inherently coercive. The Court in *Bumper v. State of North Carolina,* 88 S.Ct. 1788, said that "the situation is instinct with coercial—albeit colorably lawful coercion. However, where there is coercion there cannot be consent", Id. at 1792. Our position is that a grand jury setting is "functionally equivalent" to a police station and that, even though a person is compelled to appear before a grand jury by a subpoena, the subpoena constitutes a "lawful coercion" which removes consent and choice from a witness.

II.

MANDUJANO WAS A "PUTATIVE DEFENDANT" PRIOR TO HIS APPEARANCE BEFORE THE GRAND JURY OR DURING THE QUESTIONING BEFORE THE GRAND JURY WHEN THE QUESTIONING BECAME SPECIFIC AS TO KNOWN PRIOR ACTS OF MISCONDUCT.

The government states that they did not seek Mandujano's indictment (Petitioner's Brief, p. 40). The special prosecutor, Eb Luckel, stated that: "I had no idea that he (Respondent) would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin between Officer Cavalier and Mr. Mandujano" (App. 42). The special prosecutor said that he had not realized that the uncompleted transaction was an indictable offense (App. 44), and that he only learned that it was, when later reviewing a possible perjury indictment with another government attorney (App. 36).

The special prosecutor, Eb Luckel, testified during a pretrial hearing on August 28, 1972, that he handled all legal matters up through indictment and that he acted in that capacity from and including May 2, 1972, the date Mandujano appeared before the grand jury (App. 37), and June 13, 1973, the date the indictment was filed. The Special prosecutor stated he knew of Mandujano by way of Officer Cavalier, who attempted to make a case against Mandujano (App. 38). The special prosecutor further stated that he discussed

Mandujano's case with Officer Cavalier at least two weeks before Mandujano was compelled to appear before the grand jury (App. 38) and that he read a report of the transaction (App. 39), and that he was aware of all the facts contained in the report (App. 39). Furthermore, the special prosecutor stated that Mandujano was subpoenaed based upon his conversation with Agent Cavalier (App. 39) and based on the facts gathered by Officer Cavalier in reference to Mandujano's alleged attempt to purchase one ounce of heroin (App. 40). The special prosecutor stated that "he had no idea that he (Mandujano) would be indicted. I had no intent to present any indictment, to pursue an indictment, or in any other way to consider an indictment in regard to the negotiations or attempt to purchase heroin . . . (App. 42)." When the special prosecutor stated that "he had no intent to present any indictment", the special prosecutor may not have intended to seek an indictment on the attempted purchase of heroin but that he would after the respondent appeared before the grand jury, because Mandujano might make a wrong statement and be indicted for perjury or may admit to the attempt itself and be indicted. Because Mandujano was involved in an "unindictable offense" of attempted distribution of one ounce of heroin, the special prosecutor would have us believe that he "had no intent to present any indictment" (App. 42) against Mandujano. The special prosecutor may not have intended to indict Mandujano on the substantive offense at the time that the special prosecutor talked with the government's only witness of the attempt, Officer Cavalier, but that the special prosecutor did intend to indict respondent after he

appeared before the grand jury. This is the only logical sequel to the special prosecutor's own answers time and again that his interrogation of Mandujano before the grand jury was based solely on conversations that he had with Officer Cavalier prior to Mandujano's appearance before the grand jury. The special prosecutor's statement that the sole and exclusive reason that he asked respondent those questions to which he already knew the answers was "to gauge the truthfulness of the person's testimony (App. 45)". Right here the special prosecutor has admitted that his intent was to trap Mandujano into committing perjury. Consider, then, why did the special prosecutor, after he had asked Mandujano the question to which he already knew the answers, further ask Mandujano, "Are you sure of that?" (App. 16). Later, the special prosecutor stated: "Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?" (App. 19). The special prosecutor knew what he was doing. The proceeding was so inherently unfair that the special prosecutor did not even advise Mandujano about his right to recant as is provided for in 18 U.S.C. 1623(d). See *United States v. Lardieri*, 497 F.2d 317. The district court concluded that "it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants" (Pet. App. D, p. 29A). That is the only conclusion this Court can make. To find otherwise would result in widespread, blatant misuse of the grand jury system by the government. The government (Petitioner's Brief, p. 44) states that the test for determining whether an individual is a putative defendant is that as is espoused in *United States v. Fruchtman*, 282 F. Supp. 534, 536:

> [T]hat although the Government may not be seeking an indictment against a witness at the time he takes the stand, there may come a point in the proceeding when the situation changes to such an extent that the witness become 'virtually in the position of a defendant.'
>
> . . . This is the only logical meaning of the phrase 'virtually in the position of a defendant.' The word 'virtually' connotes an objective test. Thus the logical result is reached that a man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.

The government adopts the district court's language in *Fruchtman*, supra, that the examination of a (defendant) would not have been conducted any differently if the witness had been a potential defendant. What this indicates is that the questions posed would be the same but that at the outset of the grand jury interrogation or at the instant the answers would focus upon questions involving an indictable offense, the witness must be afforded a declaration of his rights, to include the right that the Fifth Amendment affords.

The government further states that it is going to present a difficult task to determine who a "putative defendant" is. Just because something is difficult or presents an unwanted rule should not be the determining factor in adopting the rule of the virtual and putative defendant. The government could argue the same in having the police read a person's *Miranda* warnings. The government contends that if the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and fails to administer appropriate warnings, the witness is free to

commit perjury with impunity. A similar rule applies to the rendering of *Miranda* rights by a policeman to a criminal suspect–if not done, then suppression of evidence is the remedy. Just as it must be in this case before the Court.

The government presents a test which they feel would indicate who a "putative defendant" is (Petitioner's Brief, p. 46): "That is, it must be established both that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted *and* that the government possessed substantial evidence to support an indictment at the time the witness appeared to testify before the grand jury."

Mandujano was a "putative defendant" under the test advanced by the government in that the government's attorney, Luckel, expected to indict Mandujano and that there was sufficient evidence to support the indictment as is evidenced by the affirmation of the district court's sentence of Mandujano for the substantive offense in *United States v. Mandujano*, 499 F.2d 370.

The proposed test to determine who a "putative defendant" is is based on whom the government attorney expected to indict. It seems as if it does not matter if the government expects to indict the person or not. Assuming arguendo that the question before the Court is not whether the person subpoenaed is suspect or a putative defendant; rather, that the question is whether the government is able to subpoena a person to appear before the grand jury and ask him specific questions the answers to which the government already knows. It is immaterial then whether the government

intends to seek an indictment on the substantive offense. What is significant is that if the government asks questions, the answers to which are based upon facts and evidence which in themselves are basis for an indictment, then the government must render the proper warnings to the grand jury witness. The government could avoid asking the questions which surround the offense they already have evidence on or they could give the witness an opportunity to recant or they could render immunity to the witness, in which case the government still has an effective tool in the grand jury and is thereby unfettered in their investigations. Thus, the conclusion of the arguendo is that it makes no difference whether one is suspected of an offense or that there is evidence to indict the witness. What makes the difference is that when the prosecutor subpoenas a person on the pretext of conducting an investigation, then asks questions which relate to the gathered evidence, the answers to which the government already knows, then the witness is no longer an ordinary witness but a putative defendant and must be given his warnings before questioning him any further. The government is not impeded nor frustrated if they ask questions of the witness which questions are not connected with the offense on which they already have evidence to indict the witness on. Thus this Court, even if it decides that the putative defendant concept is not applicable, pertaining to a witness appearing before a grand jury, then the Court must find that in all instances wherein the prosecution asks questions of the witness, which questions are based upon an investigation of a criminal offense to which the prosecutor already has the answers and which evidence is sufficient

to indict and prosecute, then the witness is thereby removed from the status of an ordinary grand jury witness to that of a "putative defendant" and must be advised of his *Miranda* warnings. After he is advised fully of his rights and he understands them, if the witness perjures himself, then he can be indicted. Otherwise, the testimony must be suppressed. But when a suspect or a person who was about to be indicted is compelled to appear before a grand jury and is asked specific questions about the offense he is suspected of or is about to be indicted on, then he no longer is an ordinary grand jury witness and thus must be advised of his rights as is afforded an ordinary person who is a suspect in a criminal investigation. If the government attorney believes that there is even a remote possibility of prosecution, he must warn the grand jury witness that he might be prosecuted and that his testimony might be used against him and that he has a right not to incriminate himself. *In Re Kelly*, 350 F. Supp. 1198, 1200-1205. Therefore, Mandujano was a "putative defendant" when he appeared before the grand jury as the focus of the investigation was on him. The government already had all the evidence necessary to indict him. The compelling atmosphere of the grand jury setting was coercive and he was deprived of his freedom in significant ways.

III.

THAT MANDUJANO AS A PUTATIVE DEFENDANT MUST BE AFFORDED MIRANDA WARNINGS.

There is no doubt that the privilege against self-incrimination is available to a witness if the witness desires to invoke his Fifth Amendment right to refuse to answer incriminating questions. *Kastigan v. United States,* 406 U.S. 441; *United States v. Monia,* 317 U.S. 424; *Counselman v. Hitchcock,* 142 U.S. 547, 562; *Lefkowitz v. Turley,* 414 U.S. 70, 78; *Hoffman v. United States,* 341 U.S. 479, 486-487. The decision of *Miranda v. Arizona,* 304 U.S. 436, indicates that the government must also warn the witness who appears before the grand jury inquisition that it will indict or has already gained the information on the witness which the government asks specific questions upon which the crime is based and which the government already knows the answers to. *Miranda* is concerned with the fact that a person who is the focus of a criminal investigation has understood his rights including the right to refuse to answer questions before the police begin their interrogation. 384 U.S. at 444, 467-468. See also *Escobedo v. Illinois,* 378 U.S. 478, 485. If *Miranda* applies to a criminal suspect, then it must also extend to a criminal suspect who is compelled to appear before a grand jury. This Court has held that the privilege against self-incrimination is for the personal benefit of the witness only and does not extend beyond the sphere of the witness. *United States v. Murdock,* 284 U.S. 141, 148; *Hale v. Henkel,* 201 U.S. 43, 69; *Brown v. Walker,* 161 U.S. 591; *Rogers v.*

United States, 340 U.S. 367, 371. Since the privilege is for the restrictive scope of the witness, then the witness is thereby entitled to be advised of his rights, more so, if the witness is a criminal suspect. Confer, *United States v. Jones,* 342 F.2d 863. In *Jones,* supra, the District of Columbia Court of Appeals held that when a suspect was taken before a grand jury without his consent, any questions asked of him violate his privilege. 342 F.2d 863, 868.

Mandujano was admonished by the special prosecutor but the warnings, aside from the question of whether they were understood clearly, were far inferior to the *Miranda* requirements. The government prosecutor advised Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury (App. 6)". This is inadequate to comply with *Miranda.* The government felt that in a companion case, *United States v. Rangel,* 496 F.2d 1059, that the "warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances raised a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, Rangel's case does not squarely present the issue we are raising, and we are not petitioning in his case (Pet. p. 5, Note 2)". The government therefore admits that clear and

understandable warnings are required to be given to the putative defendant witness and since the warnings were inadequate the government concedes that suppression is the proper remedy, as demonstrated by the *Rangel* decision. Reconsidering the warnings given by the special prosecutor to Mandujano, there clearly exists an ambiguous meaning, which was not understood, plus the threat that was directed to Mandujano, there exists the same question, as in *Rangel*, as to whether Mandujano may have been compelled to testify by the form of the warning or deterred by it from invoking his privilege. The government's concession that a witness in the status of a "putative defendant" must be adequately advised of his rights indicates that *Miranda* applies to a witness who is a criminal suspect, who if he is subpoenaed to testify before a grand jury, must be advised of his rights before he is questioned about the specific details of the offense which he is suspected of committing and which offense the government has evidence to indict already. *United States v. Luxenburg*, 374 F.2d 241; *United States v. Fruchtman*, 282 F. Supp. 534; *United States v. Digrazia*, 213 F. Supp. 232; *Lawn v. United States*, 115 F. Supp. 674. What the government has perpetrated against Mandujano clearly smacks against what the Court enumerated in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, which includes an unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury, or contempt and a sense of fair play. The American Bar Association in their Standards Relating to the Prosecution Function recommends:

> "If the prosecutor believes that a witness is a potential defendant he should not seek to compel

> his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advise concerning his right."

This Court in *Miranda*, 384 U.S. at 468-469, said that:

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation, a warning is a clear cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."

Thus, any witness who is compelled to appear before a grand jury and is asked questions to which the prosecution knows the answers and which is the basis of the alleged criminal act, must be given clear and understandable *Miranda* warnings. Furthermore, a witness who is in the status of a "putative defendant", that is the focus of the criminal investigation is specifically upon the witness as the violator of the law, then at the time the witness appears before the grand jury or when the interrogation before the grand jury becomes specific as to the criminal violations of the witness himself, then the witness must be advised of his *Miranda* warnings.

IV.

CAN A PUTATIVE DEFENDANT, WHO IS NOT GIVEN MIRANDA WARNINGS, COMMIT PERJURY WITH IMPUNITY?

As to this crucial point dealing with "perjury with impunity", as appears to be the end result in affirming the lower courts' decisions, there arises the question as to whether an agent of the prosecution, be it the grand jury or police, can compel a putative defendant to appear and testify against his Fifth Amendment right. The government relies on the traditional rule set out in *Glickstein v. United States*, 222 U.S. 139, 142, which simply postulates that "the immunity afforded by the constitutional guaranty relates to the past and does not endow the person who testifies with a license to commit perjury". See also *Harris v. New York*, 401 U.S. 222, 225; *Bryson v. United States*, 396 U.S. 64, 72. The petitioner contends that Mandujano committed a new criminal act, one that the Fifth Amendment gives no privilege.

These are the normal rules applicable to ordinary witnesses who appear before the grand jury. But the rule propounded under the philosophy of *Glickstein v. United States*, supra, hampers and destroys some of the protective purposes of the Fifth Amendment. The courts below based their decision on broader due process grounds than the restrictive logic that tears into the flesh of justice that the government proposes. There is no question as to the fact that the government knew that Mandujano had committed past criminal acts which were the basis of his indictment and his ultimate

conviction. However, if this Court will adopt the dictum of *Schneckloth v. Bustamonte*, infra, in looking to the "totality of the circumstances" in determining whether Mandujano's will was overborne, this Court will conclude that the entire proceeding was a farce and was a blatant denial of fundamental fairness as Mandujano had the "Hobson's Choice" (Pet. App. A, p. 15A) of the *Murphy v. Waterfront Commission*, trilemma of "self-accusation, perjury, or contempt", 378 U.S. 52, 55. The government assumes that Mandujano had the right to simply refuse to answer questions, but Mandujano's will was overwhelmed by the emotional stress and impact of being forced to appear before the grand jury, and he, being a victim of his own ignorance, was like putty being molded by the special prosecutor as the prosecutor was "primarily baiting respondent to commit perjury" (Pet. App. A., p. 11A). The government cites *United States v. Knox*, 396 U.S. 77, as the basis for holding that a defendant's perjury is unexcusable on Fifth Amendment grounds, However, in *Knox*, supra, the defendant filled out a form falsely and subsequently the forms were found to be wrong. But here, Mandujano was already investigated by the prosecution and then the prosecution subpoenaed Mandujano to appear before the grand jury under the highly questionable pretext of doing drug related investigations and then asked Mandujano the specific questions to which they already knew the answers. This Court in *Knox* held that the Fifth Amendment gives no privileges to perjurors (396 U.S. at 82). I submit that what the defendant Knox was subjected to was but a drop of water in the ocean as to what Mandujano was subjected to. Mandujano was grossly intimidated,

coerced, confused, ignorant, whose being there under those circumstances was a fundamental denial of due process. The coerciveness the government cites in *Cicenia v. Lagay*, 357 U.S. 504; *Brown v. Mississippi*, 297 U.S. 278; and *Gallegos v. Colorado*, 370 U.S. 49, demonstrates what is violative of due process requirements in that its compulsion of the mind by the atmosphere of the setting, the ignorance of Mandujano, and the purpose of having Mandujano there is coercion. The government assumes (Pet. Brief, p. 52) that coercion exists if there exists physical abuse (*Brown v. Mississippi*, supra), prolonged isolation in a hostile setting (*Gallegos v. Colorado*, supra), or extended and exhausting interrogation (*Watts v. Indiana*). Coercion exists in multitudinous forms and does not need to be physical brutality or extended interrogation or even prolonged isolation. In fact, the situation in the grand jury room was instinct with coercion.

The government further states incorrectly (Petitioner's Brief, p. 52) the holding of the lower courts when they state that the court of appeals' decision to be: "that it is inherently unfair to call as grand jury witnesses individuals known or suspected by the government to have some involvement in the kinds of criminal activity under investigation by the grand jury", Ibid. The basis of the court's decision and the question presented is whether the grand jury can subpoena individuals *known* by the government to have involvement in specific criminal conduct and whether it is a denial of due process for the prosecutor to ask specific questions of the known criminal activity to which the prosecutor knows the answers. The contention that the government had a far more plausible

motive for summoning Mandujano rather than to "entrap" him into self-incrimination or perjury is a shaky presumption. Consider then why didn't the special prosecutor avoid the subject matter already known, which was already the basis of an indictment? The special prosecutor himself tells us that he wanted to test the truthfulness of Mandujano's answers (App. 45). In other words, the special prosecutor wanted to catch Mandujano in a lie or inaccuracy to indict him for perjury.

The government throughout his brief fails to focus on the issue in Mandujano's case. The government cites *Kinsella v. United States ex. Rel. Singleton*, 361 U.S. 234 to stand for the proposition that the government's tactic was designed to "aid the grand jury in ascertaining whether a crime had been committed and if so by whom", which purpose is not shocking to the universal sense of justice or a violation of due process. In the *Kinsella* case, the government's tactic did exactly that. However, in this case, the government's tactic did not aid the grand jury in ascertaining whether a crime had been committed and by whom because the government already knew a crime had been committed and by whom because the government already knew that a crime had been committed and knew that Mandujano had done so, thus the *Kinsella* case, supra, is not applicable.

The Court of Appeals for the Fifth Circuit stated the proper test in *Betts v. Brady*, 316 U.S. 455, at 462: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of

justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial". CF. *Schneckloth v. Bustamonte*, 412 U.S. 218. If this Court concludes that there has been a usurpation of Mandujano's rights and a flagrant abuse of due process there is needed an appropriate remedy which is to suppress the alleged perjurious testimony in all cases where the government abuses the grand jury setting. The only remedy is suppression of the testimony in this case due to the denial of fundamental fairness and due process of Mandujano.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

MICHAEL ALLEN PETERS
1217 Calhoun
Houston, Texas 77002
713/237-1001
Attorney for Respondent

THE STATE OF TEXAS)
AFFIDAVIT OF SERVICE
COUNTY OF HARRIS)

1. My name is Michael Allen Peters.

2. I am licensed to practice law in the State of Texas.

3. I am not licensed to practice before the Supreme Court of the United States.

4. I represent the Respondent, Roy Mandujano.

5. I certify that a true copy was mailed by certified mail, return receipt requested, postage prepaid, to the Solicitor General of the United States, Robert Bork, Department of Justice, Washington, D.C. 20530, on this the 5th day of August, 1975.

/s/Michael Allen Peters
Michael Allen Peters

SWORN TO AND SUBSCRIBED BEFORE ME this the 5th say of August, 1975, by Michael Allen Peters, in Houston, Harris County, Texas.

/s/Gretchen A. Hagstrom
Gretchen A. Hagstrom
Notary Public in and for
Harris County, Texas

Supreme Court, U. S.
FILED
AUG 19 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

No. 74-754, 1974 Term

UNITED STATES OF AMERICA

Appellant,

v.

ROY MANDUJANO,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

STATEMENT AND BRIEF AS AMICUS CURIÆ FOR RICHARD O. KELLY

PHILIP I. PALMER, JR.

PALMER, PALMER & COFFEE
2130 First National Bank Bldg.
Dallas, Texas 75202
Tel. (214) 748-1211

Attorney for Amicus Curiae.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

Page

Table of Authorities v

Statement of Amicus Curiae for Richard O. Kelly v

Interest of Amicus Curiae 1

Argument

A. History and Usage of 18 U.S.C. §1623 1

B. Abuses in Practice

(1) Grand Jury System 3

(2) Setting Up of All Targets for Perjury 4

C. Materiality Is Ineffective As a Check Upon Abuse 6

D. Wrongful Intent Is a Subjective Standard Ineffective As a Check Upon Abuse 8

E. Appropriate Warnings Provide the More Equity Balance

(1) Interests to be Protected 10

(2) The Growing Concern Against Abuse 10

(3) Recommended Warnings 13

(4) Administrative Burden 14

Conclusion 16

Cases — Page

Carroll v. U.S. (2d Cir. 1927) 16 F.2d 951 6
Clayton v. U.S. (4th Cir. 1922) 284 Fed. 537 6
Epstein v. U.S. (2d Cir. 1921) 271 Fed. 282 6
Estep v. U.S. (10th Cir. 1943) 140 F.2d 40 9
Kastigar v. U.S. (1972) 406 U.S. 441 15
Kitchell v. U.S. (1st Cir. 1965) 354 F.2d 715 ..... 11, 15
Laplaca v. U.S. (1st Cir. 1965) 354 F.2d 56 9
Masinia v. U.S. (8th Cir. 1961) 296 F.2d 871 11
Mathis v. U.S. (1968) 391 U.S. 1 14
Sorrells v. U.S. (1932) 287 U.S. 435 11
U.S. v. Andrews (D.C. Conn. 1974) 370 F.Supp. 365 13
U.S. v. Breach (4th Cir. 1961) 296 F.2d 153 9
U.S. v. Birrell (2d Cir. 1972) 470 F.2d 113, 115 8
U.S. v. Booth (6th Cir. 1972) 454 F.2d 318 9
U.S. v. Braasch (7th Cir. 1974) 505 F.2d 139 13
U.S. v. Camporeale (2d Cir. 1975) 516 F.2d 184 ..... 12, 15
U.S. v. Capaldo (2d Cir. 1968) 402 F.2d 821 ..... 11, 15
U.S. v. Carson (2d Cir. 1972) 464 F.2d 424 15
U.S. v. Chevoor (D.C. Mass. 1975) 392 F.Supp. 436 ..... 12, 13
U.S. v. Cleary (2d Cir. 1959) 265 F.2d 459 13
U.S. v. Clizer (9th Cir. 1972) 464 F.2d 121 9
U.S. v. Corallo (2d Cir. 1969) 413 F.2d 1306 15
U.S. v. Cuevas (2d Cir. 1975) 510 F.2d 848 ..... 12, 13
U.S. v. Dawkins (5th Cir. 1973) 486 F.2d 1326 12
U.S. v. Del Toro (2d Cir. 1975) 513 R.2d 656 12
U.S. v. Dewitt (7th Cir. 1974) 499 F.2d 135 5

Page

U.S. v. Di Michelle (3d Cir. 1967) 375 F.2d 959 13
U.S. v. Dowdy (4th Cir. 1974) 479 F.2d 213 11
U.S. v. Edwards (8th Cir. 1971) 443 F.2d 1286 8
U.S. v. Edmondson (5th Cir. 1969) 410 F.2d 670 9
U.S. v. Freedman (2d Cir. 1971) 445 F.2d 1220, 1227 8
U.S. v. Gross (3d Cir. 1975) 511 F.2d 910 9
U.S. v. Irali (7th Cir. 1974) 503 F.2d 1295 13
U.S. v. Isaacs (7th Cir. 1974) 493 F.2d 1124 5
U.S. v. Kahn (2d Cir. 1973) 472 F.2d 272 3
U.S. v. Kokas (7th Cir. 1972) 466 F.2d 567 12
U.S. v. Kreps (W.D. Wisc. 1972) 349 F.Supp. 1049 13
U.S. v. Lardier (3d Cir. 1974) 497 F.2d 317 withdrawn in 506 F.2d 319 12
U.S. v. Lazaros (6th Cir. 1973) 480 F.2d 1180 8
U.S. v. Lee 509 F.2d 645 8
U.S. v. Makris (5th Cir. 1973) 483 F.2d 1082 8
U.S. v. Mancuso (2d Cir. 1973) 485 F.2d 275 8
U.S. v. Marchisio (2d Cir. 1965) 344 F.2d 653 10
U.S. v. McGinnis (S.D. Tex. 1972) 344 F.Supp. 929 13
U.S. v. Nichels (7th Cir. 1974) 502 F.2d 1173 ..... 11, 13
U.S. v. Orta (5th Cir. 1968) 253 F.2d 312 13
U.S. v. Pacente (7th Cir. 1974) 503 F.2d 543 13
U.S. v. Paolicelli (4th Cir. 1974) 505 F.2d 971 ..... 5, 7
U.S. v. Parker (7th Cir. 1957) 244 F.2d 943 13
U.S. v. Pepe (D.C. Conn. 1973) 367 F.Supp. 1365 13
U.S. v. Pommering (10th Cir. 1974) 500 F.2d 92 13
U.S. v. Ponti (E.D. Pa. 1966) 257 F.Supp. 925 13
U.S. v. Prior (D.C. Fla. 1974) 381 F.Supp. 870 13
U.S. v. Rangel (5th Cir. 1974) 496 F.2d 1054 12
U.S. v. Rivera (7th Cir. 1971) 448 F.2d 318 9

Table of Authorities — (Continued)

	Page
U.S. v. Rose (3d Cir. 1954) 215 F.2d 617	9
U.S. v. Scully (2d Cir. 1955) 225 F.2d 113	12, 13
U.S. v. Steinhibler (8th Cir. 1973) 484 F.2d 386	9
U.S. v. Sweig (2d Cir. 1971) 441 F.2d 617	9, 13
U.S. v. Washington (Dist. Col. Cir. 1974) 328 A.2d 29	13
U.S. v. Winter (2d Cir. 1965) 348 F.2d 204	13, 15
U.S. v. Wolfson (2d Cir. 1968) 405 F.2d 779	11
U.S. v. Wong (9th Cir. 1974) ..... F.2d ..... Pet. for Cert. Pending	vi, 13
Young v. U.S. (Dist. Col. Cir. 1954) 212 F.2d 236	9

OTHER AUTHORITIES

Antell, The Modern Grand Jury; Benighted Super-government, 51 A.B.A.J. 153 (1965)	3
". . . Facilitate Federal perjury prosecutions." 1970 U.S. Code Cong. and Ad. News. 4008	1
Jacoby, Transfer to Long Term Memory, 11 Journal of Verbal Learning 561 (1972)	5
Kaufman, The Grand Jury - Its Rules and Its Powers, 17 F.R.D. 331 (1955)	3
Knudsen, Pretrial Disclosure of Federal Grand Jury Testimony, 60 F.R.D. 237 (1974)	3
Lieck, Abolition of the Grand Jury in England, 25 J. Crim. L. 623 (1935)	3
Miller, 63 Gen. Psychological Review 81	5
Playboy, Vengeance Under the Law	4
Trankell, Reliability of Evidence, 21 (1972)	5
Underwood, Interference and Forgetting, 64 Gen. Phychological Rev. 49 (1957)	5
Younger, The Grand Jury Under Attack, 46 J. Crim. L. 26 (1955)	3

In the

Supreme Court of the United States

No. 74-754, 1974 Term

UNITED STATES OF AMERICA

Appellant,

v.

ROY MANDUJANO,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

STATEMENT OF AMICUS CURIÆ FOR RICHARD O. KELLY

Pursuant to Rule 42(2) of this Court, Richard O. Kelly respectfully files the annexed brief as amicus curiae in the above styled case.

Counsel for both Appellant and Appellee have consented to the request for leave to file a brief. Copies of those consents are attached to this motion.

INTEREST OF AMICUS CURIÆ

Richard O. Kelly was found guilty of one count of perjury

under 18 U.S.C. §1623 in December of 1973. His conviction was appealed to the United States Court of Appeals for the Ninth Circuit, where it was submitted upon oral argument on August 10, 1974. In August of 1975, that Court entered its interim order that the submission was vacated pending the action by this Court in the application for certiorari filed by the United States in *United States v. Wong*.

In his appeal, Richard O. Kelly contended, inter alia, that his grand jury testimony should have been supressed in that he appeared before the grand jury in the belief that he was an ordinary witness, although the trial court has found he was even then a virtual defendant, interrogated about casual conversations of more than four years before and given no warning that he was a target of the investigation and only an incomplete Miranda Warning. He was indicted upon two counts of perjury (acquitted as to one) only six months after he had refused to plead guilty or even plea bargain as to four other counts of mail fraud and conspiracy, but had filed a motion for speedy trial. He, along with three other Defendants, who also refused to plead guilty, were then indicted for perjury, with the mail fraud charges being dismissed.

Respectfully submitted,

Philip I. Palmer, Jr.
Attorney for Richard O. Kelly

In the

Supreme Court of the United States

No. 74-754, 1974 Term

UNITED STATES OF AMERICA
Appellant,

v.

ROY MANDUJANO,
Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

BRIEF AS AMICUS CURIÆ FOR RICHARD O. KELLY

INTEREST OF AMICUS CURIÆ

The personal interest of the amicus curiae in the subject matter of this case is described in the foregoing statement, supra.

ARGUMENT

A. HISTORY AND USAGE OF 18 U.S.C. §1623.

18 U.S.C. §1623 was enacted in 1970 as a part of the Organized Crime Control Act, with the admitted purpose of facilitating convictions for perjury.[1] This was accomplished,

[1] ". . . facilitate Federal perjury prosecutions." 1970 U.S. Code Cong. and Ad. News 4008.

primarily, by eliminating what is commonly called "the two witness rule" as an evidence requirement. The position advocated by this brief will be that the new statute is so effective that it is actually capable of obtaining convictions where there is no perjury, to the point that some reasonable safeguards are required to protect both interests.

The success which the new statute has enjoyed can be measured, to some extent at least, by a numerical count of the reported Federal cases involving perjury. Such a count, presented in tabular form, reveals the following for the past five decades:

1930 - 1939	22	reported perjury cases
1940 - 1949	21	reported perjury cases
1950 - 1959	68	reported perjury cases
1960 - 1969	68	reported perjury cases
1970 - Apr. 1975	97	reported perjury cases

If the 1970 decade be regarded as half over, and if the rate only stays constant without further increase, then the perjury cases for the 1970 - 1979 decade could be projected at 194 cases. The perjury cases, then, in this decade alone would exceed the cumulative total of the past forty years.

Moreover, if these cases be examined it will be observed that §1623 is now used almost exclusively. For the years 1974 and 1975, to date, there are 29 reported perjury cases. All were brought under §1623. To be sure, the newer statute is limited to perjury in Federal proceedings or before grand juries, but these are the usual places for perjury to occur.

In the normal situation, then, the United States would have

a choice as to the statute it employed. If the two witness rule should be a problem, then indictment might be had under §1623. On the other hand, if the witness has recanted so as to bar prosecution under §1623, then indictment could still be accomplished under §1621. The Second Circuit found this contention "not a little disturbing," but was unable to disagree with its accuracy. *U.S. v. Kahn*, (2d Cir. 1973) 472 F.2d 272.

B. ABUSES IN PRACTICE.

(1) Grand Jury System.

Grand Juries tend to fall into two basic types. There are still those which conduct most searching and thorough investigations into complex areas of many types. There are other grand juries, however, which receive only the results of investigations already completed and return indictments already drawn. While the grand jury may have begun as a protection to all citizens from capricious prosecution, regrettably the second type of grand jury has become, by far, the more typical. See, *Knudsen, Pretrial Disclosure of Federal Grand Jury Testimony*, 60 F.R.D. 237 (1974); *Kaufman, The Grand Jury - Its Roles and Its Powers*, 17 F.R.D. 331 (1955).

The grand jury system has come under increasing criticism, being termed no more than the prosecutor's alter ego, with little to do beyond ratify proposed indictments. *Antell, The Modern Grand Jury: Benighted Super-Government*, 51 A.B.A.J. 153 (1965); *Younger, The Grand Jury Under Attack*, 46 J. Crim. L. 26 (1955); *Lieck, Abolition of the Grand Jury in England*, 25 J. Crim. L. 623 (1935). This attack extends be-

yond the writings of legal scholars to the public generally. See, for example, the scathing attack in the August 1975 edition of *Playboy* magazine in an article entitled, "Vengeance Under the Law."

(2) Setting Up of All Targets for Perjury.

In the more normal course of events, the investigation has already been conducted by one or more agencies of the Government, usually under some active guidance from the prosecution. The central figures and the details of the crime are known. On the boundaries stand the fringe characters, only tangentally involved. The decision as to each of those is essentially a subjective one. Being human, with likes and dislikes, prejudices and emotions, these factors are difficult to ignore in making such a decision. An uncooperative or disagreeable person may find himself included with the target defendants more for reasons of personality than evidence.

In theory, of course, no real harm could result since such a defendant will enjoy the presumption of innocence until the trier of fact ultimately exonerates him for lack of evidence. Unfortunately, that analysis does violence to the reality. First, the presumption of innocence is limited to judicial mechanics. As for the remainder of the world it would be more accurate to speak in terms of an almost irrebuttable presumption of guilt that begins with the first newspaper story.

As to the second, it is §1623 which now permits the prosecution to enhance greatly its chances of conviction even with a weak case. All such target defendants are called before

the grand jury and interrogated over conversations, meetings or similar details of as far back as four or more years.[2]

The human memory just is not perfect enough to recall ancient details with great accuracy. This fact is not only common knowledge, but is supported by authoritative studies in that field. 63 *Gen. Psychological Rev.* 81; 11 *Journal of Verbal Learning,* 561 (1972), *Rehearsal and Transfer to Long Term Memory,* 64 *Psychological Review* 49 (1957) *Interference and Forgetting.*

> "After a relatively short time, we can no longer bring to mind such facts as dates, time of day, days in a week, or place of occurrence. With further lapse of time, the sequence of events begins to become rearranged . . . details confuse or fuse together to form new units." *Trankell, Reliability of Evidence,* 21 (1972)

It is to be anticipated, then, that there will be conflicts and discrepancies between the target defendant's testimony on at least several points of detail and chronology. He may even forget entirely some events to the point of denial.[3] The prosecutor, having all facts and details close at hand, can be quick to seize upon any such conflict in testimony. He may then, as a matter of tactics, add separate perjury counts to the main indictment or hold the threat of a subsequent perjury indictment as a reserve to induce a guilty plea.

The target defendant has, like as not, actually given false

---

[2] See, for example, illustrations in *U.S. v. Devitt* (7th Cir. 1974) 499 F.2d 135 (8 years); *U.S. v. Isaacs* (7th Cir. 1974) 493 F.2d 1124 (10 years; *U.S. v. Paolicelli* (4th Cir. 1974) 505 F.2d 971 (5 years).

[3] It will do the Defendant no good to answer "I do not recall" rather than an outright denial, for such an answer will also support a perjury conviction upon the reasoning that he did recall, thus either denial is false, *U.S. v. Devitt,* (7th Cir. 1974) 499 F.2d 135.

testimony however innocently it was done. He must, therefore, fall back to the defenses that it was not knowingly false at the time or that it was upon an immaterial matter.

Such a defendant may well be concerned that his case will necessarily turn, in the main, upon subjective inferences going to his state of mind. Moreover, this analysis will take place in an atmosphere poisoned by the main criminal activity that was under investigation. The Defendant may well also be but one of many, joined with the central figures by a conspiracy count. Add to those factors, the additional considerations of the expense and time following quite adverse publicity, and there is no doubt but that even an innocent man would give serious consideration to a negotiated guilty plea to a crime he did not commit.

C. MATERIALITY IS INEFFECTIVE AS A CHECK UPON ABUSE.

Although materiality was retained by Congress as an element in §1623 perjury, it has come to be defined as broadly as to be useless as a check against abuse.

Prior to 1927, there was no universally applied test for materiality in perjury before a grand jury. It was more closely examined, and sometimes found not to exist.[4] In 1927, however, the Second Circuit issued its opinion in *Carroll v. U.S.*, (2d Cir. 1927) 16 F.2d 951, and in so doing, ennunciated the test that has come to be universally applied.

Defendant Carroll was testifying to the grand jury about

[4] Examples of such pre-1927 cases are *Clayton v. U.S.* (4th Cir. 1922) 284 Fed. 537; *Epstein v. U.S.* (2d Cir. 1921) 271 Fed. 282.

a party he had given. The Government believed he had used a tub full of champagne (this being in the Volstead era) complete with a nude girl in the tub. Carroll insisted there was no girl, and the tub contained only ginger ale. When indicted for perjury, he contended that the identity of the girl was immaterial to the liquor violation under investigation. The Court disagreed, since the girl, if known, would presumably have some first hand knowledge as to the type of liquid in which she was seated.

After this clearly correct holding, the court went on to justify its decision with the language so often quoted even today:

> "Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury may be material in that it tends to influence or impede the course of the investigation.
>
> . . . the test of materiality in a grand jury investigation is whether the false testimony has a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation, and if it does, an indictment for perjury may be predicated upon it." *Carroll v. U.S.*, (2d Cir. 1927) 16 F.2d 951, 953.

Examples of more modern cases following the *Carroll* standard include *U.S. v. Paolicelli*, (4th Cir. 1974) 505 F.2d

971; *U.S. v. Makris* (5th Cir. 1973) 483 F.2d 1082; *U.S. v. Lazaros*, (6th Cir. 1973) 480 F.2d 1180.[5]

The problem with the *Carroll* test as a check against abuse is that it is so broad, little will be found so immaterial as to avoid perjury for false statements. It is somewhat difficult to imagine testimony which would be held immaterial under *Carroll* since almost anything could have at least the tendency to impede if not influence the investigation.[6]

For a brief period it seemed the Second Circuit might be moving to a stronger standard of materiality by requiring a showing that ". . . a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred." *U.S. v. Birrell* (2d Cir. 1972) 470 F.2d 113, 115; *U.S. v. Freedman* (2d Cir. 1971) 445 F.2d 1220, 1227. It now appears, however, that the second circuit has retreated back to *Carroll - U.S. v. Mancuso* (2d Cir. 1973) 485 F.2d 275. Materiality is probably the most asserted and least successful point in all perjury appeals. It can give little solace to a defendant charged with perjury.

D. WRONGFUL INTENT IS A SUBJECTIVE STANDARD INEFFECTIVE AS A CHECK UPON ABUSE.

§1623 requires that the false statement be "knowingly" made while §1621 uses the term "willfully." One court has indicated

[5] In an adversary proceeding, materiality is tested differently, "the capacity to influence the trier of fact upon the issues before it." *U.S. v. Edwards* (8th Cir. 1971) 443 F.2d 1286.

[6] It is of no consequence that the grand jury was not impeded because it already knew the truth. *U.S. v. Lee*, 509 F.2d 645.

there may be some differences in the terms. *U.S. v. Gross*, (3d Cir. 1975) 511 F.2d 910. The difference, if any, would seem to be more apparent than real since all circuits have defined "willfully" under §1621 to mean that the Defendant then knew he was giving false testimony. *Laplaca v. U.S.* (1st Cir. 1965) 354 F.2d 56 ("Did not believe the statements when made to be true."); *U.S. v. Sweig* (2d Cir. 1971) 441 F.2d 114 ("Knowledge of the falsity of his statements."); *U.S. v. Rose* (3d Cir. 1954) 215 F.2d 617 ("Must have believed what he swore to was false."); *U.S. v. Breach* (4th Cir. 1961) 296 F.2d 153 ("Accused must have known . . . what he denied."); *U.S. v. Edmondson* (5th Cir. 1969) 410 F.2d 670 ("Must not have believed the statement to be true."); *U.S. v. Booth* (6th Cir. 1972) 454 F.2d 318 ("Intent to testify falsely."); *U.S. v. Rivera* (7th Cir. 1971) 448 F.2d 757 ("Believe as to falsity of his testimony."); *U.S. v. Steinhibler* (8th Cir. 1973) 484 F.2d 386 ("A certain and clear perception of the falsity."); *U.S. v. Clizer* (9th Cir. 1972) 464 F.2d 121 ("Must have remembered the incident."); *Estep v. U.S.* (10th Cir. 1943) 140 F.2d 40 ("Purposeful misrepresentation."); *Young v. U.S.* (Dist.Col. Cir. 1954) 212 F.2d 236 ("A belief as to the falsity.").

Barring a confession, recantation or something similar there simply can be no direct evidence regarding a state of mind. It is as impossible for the prosecution to prove to a certainty that the Defendant remembered as it is for the Defendant to prove he did not. Instead, the wrongful intent must be inferred from the collateral facts and circumstantial evidence. *U.S. v. Clizer* (9th Cir. 1972 464 F.2d 121; *U.S. v. Rivera* (7th Cir. 1971) 448 F.2d 757; *U.S. v. Sweig* (2d Cir. 1971) 441 F.2d 114.

To reach such collateral facts and circumstantial evidence the prosecution will necessarily be permitted to introduce some evidence of the major crime under the grand jury's investigation. Even with the most careful instructions, the side effects of this type of evidence could still cause some innocent defendants to be found guilty. If practical, a more objective counterbalance against abuse would be preferrable to the subject analysis of another man's mind.

E. APPROPRIATE WARNINGS PROVIDE THE MORE EQUITY BALANCE.

(1) Interests to be Protected.

The grand jury system still has utility and value which should be protected. While zealous prosecutors may gain some tactical advantages in the short run, the long term effect will inevitably be for all witnesses to have a growing reluctance to testify. Defense attorneys who specialize in the area (and tend to be former prosecutors themselves) will be disinclined to permit their clients to participate fully before grand juries. As one court put it,

> ". . . witnesses who are compelled to testify will testify more freely if they know that they will not be subject to prosecution for perjury simply because an equally honest witness may well have a different recollection of the same event." *U.S. v. Marchisio* (2d Cir. 1965) 344 F.2d 653.

The result, then, should be a fair balance which will permit both interests to be served without severe restrictions upon either.

(2) The Growing Concern Against Abuse.

From time to time in earlier cases, some courts dealt with

BEST COPY AVAILABLE

contentions of abuse, but it is only within the past few years that there has been a significant evidence in the opinions of a growing concern about abuse and some affirmative effort to avoid the effects.

Defendants seeking to raise the abuse issue first talked in terms of entrapment, contending they were brought before the grand jury solely to lay a predicate for perjury. Such facts, even if true, fall short of the guidelines of classic entrapment as set by this court. *Sorrells v. U.S.* (1932) 287 U.S. 435. The problem is that even if the prosecution set the stage and anticipated the crime, such alone is not enough. As a result, the entrapment arguments were usually unsuccessful. *U.S. v. Nickels* (7th Cir. 1974) 502 F.2d 1173; *U.S. v. Lazaros* (6th Cir. 1973) 480 F.2d 174; *U.S. v. Dowdy* (4th Cir. 1974) 479 F.2d 213. The case *sub judice* is more accurate when it holds that the conduct "smacks of entrapment," which of course, it does. There is also earlier dictum that if the interrogation was conducted only to set a trap for a perjury charge, then some relief could be granted. *Masinia v. U.S.*, (8th Cir. 1961) 296 F.2d 871. Certainly, only in the rarest cases will true entrapment be made out in a perjury case.

Other defendants have gone so far as to assert that virtual defendants should not be called before the grand jury at all. It is obvious, however, that it would be much too restrictive if there were an outright prohibition against receiving testimony from target figures. It is, consequently, none too surprising that this extreme contention has found no favor. *U.S. v. Wolfson* (2d Cir. 1968) 405 F.2d 779; *U.S. v. Capaldo* (2d Cir. 1968) 402 F.2d 79; *Kitchell v. U.S.* (1st Cir. 1965) 354 F.2d 715.

On the other hand, there is certainly judicial hostility to the needless calling of targets, especially if such be done only in the hope of obtaining perjurious testimony. *U.S. v. Del Toro* (2d Cir. 1975) 513 F.2d 656; *U.S. v. Dawkins* (5th Cir. 1973) 486 F.2d 1326; *U.S. v. Scully*, (2d Cir. 1955) 225 F.2d 113; *U.S. v. Chevoor* (D.C. Mass. 1975) 392 F.Supp. 436.

Others have urged that the Government should have an affirmative duty to give warning if it is known they are lying. This position would be difficult to administer since the U.S. may know there is a conflict, but less able to tell just who was lying. In any event, the point has gained no support. *U.S. v. Del Toro* (2d Cir. 1975) 513 F.2d 656; *U.S. v. Kokas* (7th Cir. 1972) 466 F.2d 567; *U.S. v. Scully* (2d Cir. 1955) 225 F.2d 113.

In what is perhaps a modified offshoot of the same position, the Third Circuit briefly required affirmative disclosure of the right to recant. *U.S. v. Lardieri* (3d Cir. 1974) 497 F.2d 317, withdrawn in 506 F.2d 319. It has not been adopted elsewhere. *U.S. v. Camporeale* (2d Cir. 1975) 515 F.2d 184; *U.S. v. Cuevas* (2d Cir. 1975) 510 F.2d 848.

The area in which there is a discernable trend is that of requiring the full panoply of the Miranda Warnings to any person called before the grand jury who is a target or in the position of being a virtual defendant.

Many of these same authorities also require or endorse a target warning, that is, advising such a witness expressly that he is a subject of the grand jury investigation.

The cases reflecting this trend include *U.S. v. Rangel* (5th

Cir. 1974) 496 F.2d 1054; *U.S. v. Wong* (9th Cir. 1974) ..... F.2d ..... (Pet. for Cert. Pending); *U.S. v. Winter* (2d Cir. 1965) 348 F.2d 204; *U.S. v. Parker* (7th Cir. 1957), 244 F.2d 943; *U.S. v. Scully* (2d Cir. 1955) 225 F.2d 113; *U.S. v. Chevoor* (D.C. Mass. 1975) 392 F.Supp. 436; *U.S. v. Prior* (D.C. Fla. 1974), 381 F.Supp. 870; *U.S. v. Pepe* (D.C. Conn. 1973) 367 F.Supp. 1365; *U.S. v. Kreps* (W.D. Wisc. 1972) 349 F.Supp. 1049; *U.S. v. McGinnis* (S.D. Tex. 1972) 344 F.Supp. 929; *U.S. v. Washington* (Dist. Col. Cir. 1974) 328 A.2d 98 (Pet. for Cert. Pending).

Other authorities reach different views, some reluctantly, but most upon the grounds that no witness should be entitled to lie with immunity. The point to the warnings, however, is not to condone false testimony, but to be as certain as one can be, that it is truly perjury rather than an honest mistake. The contra cases include *U.S. v. Cuevas* (2d Cir. 1975) 510 F.2d 848; *U.S. v. Braasch* (7th Cir. 1974) 505 F.2d 139; *U.S. v. Irali* (7th Cir. 1974) 503 F.2d 1295; *U.S. v. Pacente* (7th Cir. 1974) 503 F.2d 543; *U.S. v. Nickels* (7th Cir. 1974) 502 F.2d 1173; *U.S. v. Pommering* (10th Cir. 1974) 500 F.2d 92; *U.S. v. DiMichelle* (3d Cir. 1967) 375 F.2d 959; *U.S. v. Orta* (5th Cir. 1968) 253 F.2d 312; *U.S. v. Cleary* (2d Cir. 1959) 265 F.2d 459; *U.S. v. Andrews* (D.C. Conn. 1974) 370 F.Supp. 365; *U.S. v. Sweig* (S.D.N.Y. 1970) 316 F.Supp. 1148; *U.S. v. Ponti* (E.D. Pa. 1966) 257 F.Supp. 925.

(3) Recommended Warnings.

It is recommended that two warnings be given. The defendant should be told prior to the time of his testimony that he

is a subject of the investigation. This could be accomplished with no more than one sentence to be typed upon the subpoena. The purpose, of course, is to emphasize to the witness the importance to him of full, frank and accurate testimony. By providing such a warning in advance, the witness is afforded a reasonable opportunity to review his records and refresh his memory prior to his appearance. If such prior warning is given, and false testimony is still the result, there is a much more comfortable feeling that the perjury conviction was deserved.

The full Miranda Warning should also be given at or near the time of actual testimony. Certainly, it is true, as many courts point out, Miranda Warnings were created for in custody interrogations while a grand jury witness is not technically in custody. On the other hand, Miranda should apply whenever one has been deprived of his freedom in any significant way. *Mathis v. U.S.* (1968) 391 U.S. 1. It is the totality of the surrounding circumstances which bring Miranda into play, rather than any single mechanical event.

In a grand jury proceeding the attendance of the witness is compelled. He is isolated from his attorney, if he even has one. He is subjected to cross-examination by the prosecutor with no judge present. The aura and atmosphere of intimidations which lead to Miranda are all equally present. Just as Miranda was intended to insure statements were freely given, so should it be extended to help insure the statements are truthfully given.

(4) Administrative Burden.

Neither warning should pose any administrative difficulties

whatever. Indeed, quotations from reported cases indicate both Miranda and target warnings are already commonly given so the only real effect will be to make the practice uniform and provide a single standard. *U.S. v. Camporeale* (2d Cir. 1975) 515 F.2d 184; *U.S. v. Carson* (2d Cir. 1972) 464 F.2d 424; *U.S. v. Corallo* (2d Cir. 1969) 413 F.2d 1306; *U.S. v. Capaldo* (2d Cir. 1968) 402 F.2d 821; *Kitchell v. U.S.* (1st Cir. 1965) 354 F.2d 715; *U.S. v. Winter* (2d Cir. 1965) 348 F.2d 204.

The only possible adverse effect to the prosecution might be that some witnesses, on learning they were targets would refuse to testify. It is not believed, however, that this will be a serious problem. First, the central figures would already be aware that they were targets so that the official warning would be no great surprise. Their testimony could still be compelled by the grant of no more than use immunity. *Kastigar v. U.S.* (1972) 406 U.S. 441.

Secondly, as to the fringe and tangental targets, the reaction could be favorable in that they might well provide fullest cooperation in an effect to change their classification. This reaction can almost be predicted with certainty in that group against whom the abuse strikes the hardest, fringe defendants who were included as targets because of character, personality or attitude.

In sum, then, the full Miranda plus a prior target warning should provide a fair protection against overzealous prosecution with a bare minimum of inconvenience to either the Government or the grand jury function.

CONCLUSION

For the reasons set forth, this Court should affirm the decision below and ratify the requirement of a full Miranda warning and prior target warning to all witnesses called before a grand jury at a time when they are virtual defendants.

Respectfully submitted,

PHILIP I. PALMER, JR.
PALMER, PALMER & COFFEE
2130 First National Bank Bldg.
Dallas, Texas 75202
Tel. (214) 748-1211

Attorney for Amicus Curiae.